TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947 48

No. 52 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 21, 1947.

CERTIORARI GRANTED APRIL 28, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the United States Circuit Court of Appeals For the Seventh Circuit

No. 8932

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC.,
Respondents.

U. S. C. C. A. - 7
FILED
MAY 4 - 1946
KENNETH J. CARRICK
CLERK

Petition for Review of Decision of the Tax Court of the United States.

TRANSCRIPT OF RECORD FILED SEP. 22, 1945.
PRINTED RECORD.

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8932

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC.,

Respondents.

Petition for Review of Decision of the Tax Court of the United States.

USCA 1563 The Gunthorp-Warren Printing Co., Chicago—5-3-46—50

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1 Estate of Sidney M. Spiegel, Deceased, Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors, Under The Last Will and Testament of Sidney M. Spiegel, Deceased, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.* } Docket No. 1662

Appearances:

For Taxpayer:
Harry Thom, Esq.,
Benjamin A. Ragir, Esq.,

For Comm'r:
Harold H. Hart, Esq.

DOCKET ENTRIES.

1943

May 14—Petition received and filed. Taxpayer notified. Fee paid.

May 15—Copy of petition served on General Counsel.

Jul. 3—Answer filed by General Counsel.

Jul. 3—Request for hearing in Chicago, Illinois, filed by General Counsel.

Jul. 7—Notice issued placing proceeding on Chicago, Ill., calendar. Answer and request served.

1944

Jul. 24—Hearing set September 25, 1944 in Chicago, Illinois.

Sep. 26—Hearing had before Judge Sternhagen on merits. Stipulation of facts and motion to amend petition, motion granted, filed at hearing. Briefs due per rules.

Oct. 3—Copy of motion to amend petition filed by General Counsel.

Oct. 25—Transcript of hearing 9/26/44 filed.

Oct. 26—Brief filed by General Counsel.

Nov. 10—Brief filed by taxpayer 11/10/44. Copy served.

Nov. 25—Reply brief filed by General Counsel. Served 11/27/44.

1945

Feb. 24—Findings of fact and memorandum opinion rendered, Judge Sternhagen. Decision will be entered under Rule 50. 1/26/45 Copies served.

Mar. 26—Computation of deficiency filed by General Counsel.

Mar. 28—Hearing set April 11, 1945 on settlement.

Apr. 2—Consent to settlement filed by taxpayer.

Apr. 3—Decision entered, Judge Sternhagen. Div. 10.

Jun. 29—Petition for review by U. S. Circuit Court of Appeals, 7th Circuit, filed by General Counsel.

Jun. 29—Statement of points to be relied upon, filed by General Counsel.

Jun. 30—Notice of filing petition for review and statement of points sent to Harry Thom, filed.

Jul. 4—Proof of service filed.

Jul. 20—Proof of service of petition for review and statement of points filed. (2)

Jul. 28—Motion for extension to 9/26/45 to prepare and transmit record filed.

2 1945

Jul. 28—Order entered extending time to 9/26/45 to prepare and transmit the record, entered.

Sep. 11—Designation of portions of record filed by General Counsel.

3 THE TAX COURT OF THE UNITED STATES.

Estate of Sidney M. Spiegel, Deceased, Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors under the Last Will and Testament of Sidney M. Spiegel, Deceased, *Petitioners*, *vs.* Commissioner of Internal Revenue, *Respondent*.	Docket No. 1662

PETITION.

(Filed May 14, 1943.)

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (ET:TDB:1st Illinois: Estate of Sidney M. Spiegel) dated February 16, 1943, and as a basis of their proceeding allege as follows:

1. Petitioners are the duly appointed, qualified and acting executors under the Last Will and Testament of Sidney M. Spiegel, deceased, with office address at 540 N. Michigan Ave., Chicago, Illinois. The estate tax return here involved was filed with the Collector of Internal Revenue for the First District of Illinois.

4 2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioners on February 16, 1943.

3. The taxes in controversy are estate taxes and in the amount of approximately $459,188.58; petitioners claim a refund of approximately $4,400.00.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in including in the gross estate of the decedent the sum of $1,140,606.30 or any other amount on account of the value of property which was transferred by said decedent in his lifetime to Modie J. Spiegel and Sidney M. Spiegel as Trustees under trust agreement dated January 2, 1920.

(b) The Commissioner of Internal Revenue erred in failing to allow as a deduction from the value of the decedent's gross estate the sum of $10,000.00, being additional attorney's fees incurred or to be incurred by said executors in and about the administration of the decedent's estate.

(c) The Commissioner of Internal Revenue erred in failing to allow as a deduction from the value of the decedent's gross estate the sum of $3,000.00, being additional miscellaneous administration expenses incurred or to be incurred by said executors in and about the administration of the decedent's estate.

(d) The Commissioner of Internal Revenue erred in failing to allow as a deduction from the value of the decedent's gross estate the sum of at least $10,000.00, being executors' commissions to be incurred in and about the administration of the decedent's estate.

5. The facts upon which the petitioners rely as a basis of this proceeding are as follows:

(a) Under date of January 2, 1920, decedent executed and delivered a trust indenture to Modie J. Spiegel and Sidney M. Spiegel, as trustees, pursuant to which he set up an irrevocable trust for the primary benefit of his three children, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Julia K. Spiegel, respectively. A copy of said trust indenture is attached hereto as Exhibit B. Under the terms of said agreement the trustees were to divide the net income into three equal parts and pay or use one of said parts of said income to or for the maintenance, support and education of each of the primary beneficiaries. Upon the death of Sidney M. Spiegel, the trustees were to divide said trust fund and any accumulated income thereon equally among said three primary beneficiaries or if any of said beneficiaries were dead at said distribution date, the share of such deceased child was to go to the surviving child or children of such deceased child, or if such deceased child died without leaving any surviving child or children, then the share of such deceased child was to go to the donor's remaining children and the descendants of any deceased child of the donor, per stirpes and not per capita. All three primary beneficiaries were alive at the date of Sidney M. Spiegel's death and received their respective shares of the trust estate.

7 In his said notice of deficiency, the Commissioner has held that the transfers to said trust were made to take effect in possession or enjoyment at or after the grantor's death. The petitioners contend that the transfer of said property was complete and absolute when the property was transferred to said trustees and said transfers were not made by the decedent to take effect in possession or enjoyment at or after his death. The executors filed their Federal estate tax return with the Collector of Internal Revenue at Chicago, Illinois, on March 19, 1942 and on said date paid the Federal estate taxes shown on said return of $180,404.41.

(b) Petitioners have become and will hereafter become liable for attorneys' fees (in addition to the $6,000 heretofore paid by petitioners as attorneys' fees and set out in their original estate tax return heretofore filed by the petitioners) in connection with the administration of said estate and particularly in connection with this proceeding in a total sum as yet undetermined, but not less than
8 $10,000.00.

(c) Petitioners have become and will hereafter become liable for miscellaneous administration expenses (in addition to the miscellaneous administration expenses set out in the estate tax return) in a total amount as yet undetermined, but not less than $3,000.00.

(d) Petitioners are entitled to executors' commissions in the sum of not less than $10,000.00 and claim a deduction therefor from the gross estate.

Wherefore, the petitioners pray that this Court may hear the proceeding and decide that they are not liable for any additional estate taxes, but are entitled to a refund of estate taxes heretofore paid in the amount of $4,400.00, or such greater amount as is legally refundable.

Harry Thom
Benjamin A. Ragir
231 S. La Salle Street,
Chicago, Illinois.
Attorneys for Petitioners.

Mayer, Meyer, Austrian & Platt,
Of Counsel

9 State of Illinois, } ss.
County of Cook. }

Sidney M. Spiegel, Jr., being first duly sworn, says that he is one of the petitioner above named and a duly appointed and acting Executor under the Last Will and Testament of Sidney M. Spiegel, deceased; that he is duly authorized to verify the above and foregoing petition; that he has read the above and foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true, except those, which are stated to be upon information and belief, and that, as to those, he believes them to be true.

Sidney M. Spiegel, Jr.

Subscribed and sworn to before me this 12th day of May, 1943.

William C. Brooks,
Notary Public.

10 State of Illinois, } ss.
County of Cook. }

Katherine J. Spiegel, being first duly sworn, says that she is one of the petitioners above named and a duly appointed and acting Executor under the Last Will and Testament of Sidney M. Spiegel, deceased; that she is duly authorized to verify the foregoing petition; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

Katherine J. Spiegel.

Subscribed and sworn to before me this 12th day of May, 1943.

William C. Brooks,
Notary Public.

11 State of Illinois, }
County of Cook. } ss.

Robert Michels, being first duly sworn, says that he is one of the petitioners above named and a duly appointed and acting Executor under the Last Will and Testament of Sidney M. Spiegel, deceased; that he is duly authorized to verify the above and foregoing petition; that he has read the above and foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true, except those, which are stated to be upon information and belief, and that, as to those, he believes them to be true.

Robert Michels.

Subscribed and sworn to before me this 11th day of May, 1943.

Maurice A. Hadesman,
Notary Public.

12 EXHIBIT A.

Treasury Department
Internal Revenue Service.

Office of
Internal Revenue Agent
in Charge
Chicago Division
105 W. Adams Street
ET:TDB

February 16, 1943.

Mr. Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors of the Estate of Sidney M. Spiegel, deceased,
540 North Michigan Avenue,
Chicago, Illinois.

Sirs:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of $454,788.58, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Chicago, Illinois, for the attention of the Estate Tax Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
Guy T. Helvering,
Commissioner.
By (sgd.) E. C. Wright,
Internal Revenue Agent in Charge.

Enclosures:
Statement
Form of waiver
Form 272M

13 Statement

Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors of the Estate of Sidney M. Spiegel, deceased, 540 North Michigan Avenue, Chicago, Illinois.

	Liability	Assessed	Deficiency
Estate Tax	$635,192.99	180,404.41	454,788.58

The following statement shows the final determination of this office in connection with the preliminary notice (30 day letter) issued December 10, 1942, and protest filed on January 9, 1943:

Adjustments to net estate

Net estate for basic tax as disclosed by return		$ 841,042.81
Additions to value of gross estate and decreases in deductions:		
Stocks and Bonds	$ 6,710.98	
Mortgages, notes and cash	3,838.80	
Transfers	1,140,606.30	
Debts of decedent	33.13	1,151,189.21
		$1,992,232.02
Reduction in value of net estate and decreases in deductions		0.00
Net estate for basic tax as adjusted		$1,992,232.02
Net estate for additional tax as adjusted		$2,052,232.02

Explanation of adjustments

Stocks and Bonds	Returned	Determined
Item 3	0.00	360.00
" 4	0.00	1,206.00
" 11	0.00	120.00
" 12	0.00	630.00
" 16	0.00	150.00
" 17	0.00	350.00
" 18	0.00	175.00
" 20	0.00	139.20
" 24	0.00	625.00
" 25	0.00	300.00
" 30	0.00	73.80
" 34	0.00	269.83
" 39	0.00	1,020.00
" 44	0.00	375.00
14 " 45	0.00	900.00
" 48	100.92	99.17
" 53	77.77	76.67

The determined values of items 3, 4, 11, 12, 16, 17, 18, 20, 24, 25, 30, 34, 39, 44, 45 represent dividends on shares of stock payable subsequent to date of decedent's death to holders of record of a date prior to decedent's death.

The determined values of items 48 and 53 represent interest accrued to date of decedent's death.

Mortgages, notes and cash	Returned	Determined
Item 5	2,874.27	4,911.19
" 9	0.00	1,801.88

The determined value of item 5 is based upon reliable information procured by this office during the course of the investigation.

The determined value of item 9 represents the amount received by the estate in final settlement.

Transfers Unreturned items	Returned	Determined
1—Cash	0.00	74,228.35
2— 4 shares, common capital stock of Amerix Holding Corporation @ 12¼	0.00	49.00
3— 500 " common capital stock of American Can Company @ 86⅜	0.00	43,187.50
4— 160 " common capital stock of American National Bank and Trust Company @ 225	0.00	36,000.00
5— 400 " common capital stock of American Railways Corporation @ ¾	0.00	300.00
6— 200 " common capital stock of Archer-Daniels-Midland Company @ 30	0.00	6,000.00
7— 100 " common capital stock of Arlington Mills Company @ 29	0.00	2,900.00
8— 150 " 5% preferred capital stock of Associates Investment Company @ 94¾	0.00	14,212.50
8— Dividend	0.00	187.50
9— 600 " common capital stock of Associates Investment Company @ 35½	0.00	21,300.00
9— Dividend	0.00	900.00

15					
10—	100	"	5% common preferred capital stock, Building Realty Company @ 85	0.00	8,500.00
11—	500	"	common capital stock Burrows Adding Machine Company @ 7½	0.00	3,750.00
12—	200	"	common capital stock Celotex Company @ 6¼	0.00	1,250.00
13—	1000	"	common capital stock, Central Public Utility Corporation @ 0	0.00	0.00
14—	100	"	7% preferred capital stock, Central and S. W. Utilities Company @ 106	0.00	10,600.00
14—			Dividend	0.00	175.00
15—	38	"	common capital stock, Chase National Bank Company @ 32¾	0.00	1,249.25
16—	4	"	4% Class A preferred capital stock, Chesapeake and Ohio Railway Company @ 100	0.00	400.00
17—	200	"	common capital stock, Chesapeake and Ohio Railway Company @ 41½	0.00	8,300.00
17—			Dividend	0.00	125.00
18—	200	"	common capital stock Chicago Railway Equipment Company @ 16	0.00	3,200.00
19—	600	"	common capital stock, Cliffs Corporation @ 16¾	0.00	10,125.00
20—	65	"	common capital stock, Community Public Service Company @ 23	0.00	1,495.00
21—	12	"	common participating certificates, Consolidated Office Building Company @ 0	0.00	0.00

22—	1000	"	common capital stock, Consolidated Oil Corporation @ 5⅝	0.00 5,625.00
23—	480	"	common capital stock, Continental Can Company @ 36¾	0.00 17,700.00
24—	200	"	common capital stock, Creole Petroleum Corporation @ 12⅞	0.00 2,575.00
25—	400	"	common capital stock, Curtis Manufacturing Company @ 7	0.00 2,800.00
26—	800	"	common capital stock, Distillers Corporation, Seagrams, Limited, @ 18¼	0.00 14,600.00
27—	100	"	common capital stock, Fullerton Amusement Company @ 0	0.00 0.00
28—	100	"	3% preferred capital stock, Gardner-Denver Company @ 17	0.00 1,700.00
28—			Dividend	0.00 25.00
29—	66	"	common, Class A, capital stock, General Analine and Film Corporation @ 56	0.00 3,696.00
30—	900	"	common capital stock, General Electric Company @ 32¼	0.00 29,025.00
30—			Dividend	0.00 720.00

16

31—	300	"	common capital stock, General Tire and Rubber Company @ 11½	0.00 3,450.00
32—	400	"	50¢ non-cum. Pfd. stock, Globe News Publishing Company @ 11	0.00
33—	400	"	common capital stock, Globe News Publishing Company	0.00 4,400.00

34—	500	"	common capital stock, Granite City Steel Company @ 13¼	0.00	6,625.00
			Dividend	0.00	125.00
35—	100	"	common capital stock, Holland Furnace Company @ 30⅜	0.00	3,037.50
36—	200	"	common capital stock, International-Nickel of Canada, Ltd., @ 22⅞	0.00	4,575.00
37—	680	"	common capital stock, Iowa Public Service Company @ 3⅞	0.00	2,635.00
38—	200	"	common capital stock, Jefferson Electric Company @ 20¼	0.00	4,050.00
38—			Dividend	0.00	250.00
39—	300	"	common capital stock, Jones and Laughlin Steel Corporation @ 33⅜	0.00	10,012.50
40—	108	Stock	transfer certificates, Knickerbocker Building Corporation @ 52	0.00	5,616.00
41—	200	shares,	common capital stock, Libby-Owens Ford Glass Company, @ 40¼	0.00	8,025.00
42—	100	"	common capital stock, Ludlow Mfg. Associates @ 103	0.00	10,300.00
43—	52	"	common participating certificates, Mar-Main Corporation @ 0	0.00	0.00
44—	100	"	common capital stock of Mergenthaler Linotype Company @ 23¼	0.00	2,325.00
45—	40	"	common capital stock of Metropolitan Playhouses, Inc., @ 0	0.00	0.00
46—	1000	"	common capital stock, Michigan Sugar Company @ ½	0.00	500.00
47—	1000	"	common capital stock, Missouri-Kansas-Texas R. R. Co. @ ⅜	0.00	375.00

48—1359	"	common capital stock, Monsanto Chemical Company @ 80⅞	0.00	109,909.13
49— 342	"	common capital stock, Montgomery Ward and Company, Inc., @ 36½	0.00	12,483.00
50— 150	"	preferred capital stock, Murray Wolbach Associates, Inc., @ 94	0.00	14,100.00
51— 150	"	common capital stock, Murray Wolbach Associates, Inc., @ 1	0.00	150.00
17				
52— 150	"	5% preferred capital stock, National Bond and Investment Company @ 86¾	0.00	13,012.50
52—		Dividend	0.00	187.50
53— 650	"	common capital stock, National Bond and Investment Company @ 13	0.00	8,450.00
53—		Dividend	0.00	682.50
54—1000	"	common capital stock, National Cylinder Gas Company @ 10¾	0.00	10,750.00
54—		Dividend	0.00	200.00
55— 500	"	common capital stock, National Power and Light Company @ 6¾	0.00	3,375.00
56— 500	"	common capital stock New York Central Railroad Company @ 13	0.00	6,500.00
57— 360	"	common capital stock, Newport Industries, Inc., @ 7¾	0.00	2,790.00
58—1000	"	common capital stock of The Ohio Oil Company @ 6¾	0.00	6,750.00
59— 90	"	Non-cum. preferred capital stock of Ohio Service Holding Corporation @ 51½	0.00	4,635.00

60—	30	"	common capital stock of Ohio Service Holding Corporation @ 43½	0.00	1,305.00
61—	600	"	common capital stock, Oliver Farm Equipment Company @ 16⅞	0.00	10,125.00
62—	500	"	common capital stock, Otis Steel Company @ 9¼	0.00	4,625.00
63—	200	"	common capital stock, Paraffine Companies, Inc., @ 34⅜	0.00	6,875.00
63—			Dividend	0.00	100.00
64—	301	"	common capital stock, Parke, Davis and Company @ 29¾	0.00	8,954.75
65—	880	"	Class B capital stock, Pennsylvania Gas and Electric @ 8¢	0.00	70.40
66—	700	"	Common capital stock, The Pennsylvania Railroad Company @ 21⅝	0.00	15,137.00
67—	50	"	Common capital stock, Radio Corporation of America @ 4½	0.00	225.00
67—			Dividend	0.00	10.00
18					
68—	180	"	6% preferred capital stock, Radio-Keith Orpheum Corporation @ 42¼	0.00	7,605.00
69—	900	"	common capital stock, Radio-Keith Orpheum Corporation @ 3½	0.00	3,150.00
70—	100	"	V. T. Partic. Certificate, Randolph Hotel Co @ 9¾	0.00	975.00
71—	300	"	common capital stock, Reynolds Metal Co. @ 12¼	0.00	3,675.50
71—			Dividend	0.00	90.00

72—	500	"	common capital stock, H. H. Robertson Company @ 18½	0.00	9,250.00
73—	900	"	common capital stock, The Ruberoid Company @ 15¾	0.00	14,175.00
73—			Dividend	0.00	900.00
74—	500	"	common capital stock, Sangamo Electric Company @ 21⅜	0.00	10,687.50
74—			Dividend	0.00	500.00
75—	200	"	common capital stock, Schenley Distillers Corporation @ 10⅝	0.00	2,125.00
76—	1000	"	common capital stock, Sears, Roebuck Company @ 75⅝	0.00	75,625.00
77—	300	"	Class A common capital stock, Serrick Corporation @ 4⅛	0.00	1,237.50
78—	200	"	common capital stock, Simmons Company @ 19¾	0.00	3,950.00
79—	400	"	common capital stock, Sioux City Gas & Electric Company @ 13¾	0.00	5,500.00
80—	500	"	common capital stock, Southern Pacific Company @ 7⅝	0.00	3,812.50
81—	200	"	common capital stock, Southern Ry. Company @ 12	0.00	2,400.00
82—	204	"	common capital stock, Spencer-Kellogg & Sons, Inc., @ 20¼	0.00	4,131.00
83—	500	"	common capital stock, Standard Oil Co. of California @ 18	0.00	9,000.00
84—	208	"	common capital stock, Standard Oil Co. of New Jersey @ 33¼	0.00	6,916.00
85—	200	"	common capital stock, Standard Steel Spring Company @ 29½	0.00	5,900.00

86—	700	"	common capital stock, Texas Gulf Sulphur Co. @ 36⅝	0.00 25,637.50
87—	50	"	common capital stock, Todd Shipyards Corporation @ 89	0.00 4,450.00
88—	1000	"	common capital stock, Tri-Continental Corporation @ 1½	0.00 1,500.00
19				
89—	600	"	common capital stock, Union Carbide and Carbon Company @ 68	0.00 40,800.00
90—	300	"	common capital stock, The United Corporation @ 1¼	0.00 375.00
91—	300	"	common capital stock, Wheeling Steel Corporation @ 28	0.00 8,400.00
92—	500	"	V. T. Certificates, Wickwire Spencer Steel Company @ 4⅞	0.00 2,437.50
93—	400	"	common capital stock, Wm. Wrigley, Jr., @ 80¼	0.00 32,050.00
94—	$5,000.00	face value, 4% Baltimore and Ohio R. R. Co. bonds, due 8/4/44 @ 55		0.00 2,750.00
94—		Accrued interest		0.00 76.67
95—	$20,000.00	face value 5% Canadian National Ry. Co. bonds due 10/1/69 @ 96½		0.00 19,300.00
95—		Accrued interest		0.00 216.67
96—	$10,000.00	face value, 7% Dept. of Cauca Valley bonds, due 1948 @ 8		0.00 800.00
97—	$25,000.00	face value, 5% Central of Georgia Ry. Co. bonds due 1945 @ 5¼		0.00 1,281.25
98—	$20,000.00	face value, 5%, Series C, Central of Georgia Ry. Co. bonds due 1959 @ 1		0.00 200.00

99—	$50,000.00	face value 5½%; Central Public Utility Corporation bonds due 1952 @ 1	0.00	500.00
100—	$5000.00	face value, 5% Central States Electric Corp. bonds due 1948 @ 27⅞	0.00	1,381.25
100—		Accrued interest	0.00	116.65
101—	$ 10,000.00,	face value, 5½%, Central States Electric Corp. bonds due 1954, @ 28⅝	0.00	2,862.50
101—		Accrued interest	0.00	143.61
102—	$ 15,000.00,	face value, 5%, Gen. Mtg. Chicago and Eastern Illinois Ry. Co. bonds, due 1951 @ 14¾	0.00	2,212.50
103—	$ 12,000.00,	face value, 5%, Chicago and Eastern Illinois Ry. Co. bonds, due 1951 @ 14⅞	0.00	1,770.00
104—	$ 10,000.00,	face value, 6%, Chicago, Indianapolis & Louisville Ry. Co. bonds due 1947 @ 17⅝	0.00	1,762.50
20.				
105—	$104,000.00,	face value, 4¾%, Chicago & Northwestern Ry. Co. bonds due 1949 @ 1⅛	0.00	1,170.00
106—	$ 10,000.00,	face value, 5%, City Service Co. bonds due 1958, @ 84¼	0.00	8,412.50
106—		Accrued interest	0.00	108.33
107—	$ 35,000.00,	face value, City of Chicago Special Assessment vouchers at sale price	0.00	15,000.00
107—		Accrued interest	0.00	1,027.49
108—	$ 2,560.00,	face value, City of Chicago Special Assessment bonds @ 100	0.00	2,560.00
109—	$. 6,000.00,	face value, 3% Consolidated Office Building Co. bonds due 1954 @ 6.48	0.00	388.80

110	$ 15,000.00,	face value, 6½%, Cosgrove-Meehan Coal Corp. bonds due 1945 @ 4¾	0.00	712.50
111	$ 40,000.00,	face value, 5%, Erie Railroad Co. bonds, due 1975, @ 18⅜	0.00	7,350.00
112	$ 10,000.00,	face value, 5%, Erie Railroad Co. bonds, due 1967, @ 18⅜	0.00	1,837.50
113	$ 6,000.00,	face value, 5%, Fallansbee Bros. Co. bonds, due 1947, @ 36	0.00	2,160.00
114	$ 5,000.00,	face value, Globe News Publishing Co. @ 0	0.00	0.00
115	$ 5,000.00,	face value, 3%, Hotel Syracuse, Inc. bonds due 1955, @ 77	0.00	3,850.00
115		Accrued interest	0.00	57.50
116	$ 5,000.00,	face value, 5% Indiana Service Corp. bonds, due 1950 @ 74⅜	0.00	3,718.75
116		Accrued interest	0.00	116.67
117	$ 9,000.00,	face value, 4% Mar-Main Corporation bonds, due 1947 @ 102	0.00	9,180.00
117		Accrued interest	0.00	138.00
21				
118	$ 5,500.00,	face value, 5%, Metropolitan Playhouse bonds, due 1945, @ 66	0.00	3,630.00
118		Accrued interest	0.00	183.32
119	$ 25,000.00,	face value, 6%, Midland Utility Co. bonds, due 1938, @ 61	0.00	15,250.00
120	$ 10,000.00,	face value, 6%, Midland Utility Co. (C. D.'s), due 1938, @ 61½	0.00	6,150.00
121	$ 30,000.00,	face value, 4%, Missouri Pacific Ry. bonds, due 1975, @ 1⅜	0.00	412.50

122	$ 10,000.00,	face value, 4¾ Morgan County School District bonds, due 1942, @ 107	0.00	10,700.00
122		Accrued interest	0.00	142.50
123	$ 5,000.00,	face value, 5%, New England Gas and Electric Association bonds, due 1950, @ 64⅜	0.00	3,218.75
123		Accrued interest	0.00	33.34
124	$ 5,000.00,	face value, 4½% New York, Chicago & St. Louis R. R. bonds, due 1978, @ 60⅛	0.00	3,006.25
124		Accrued interest	0.00	67.50
125	$ 5,000.00,	face value, 5%, Old Dominion Power Co. bonds, due 1951, @ 82¾	0.00	4,137.50
125		Accrued interest	0.00	23.62
126	$ 30,000.00,	face value, 4½% Portland General Electric Co. bonds, due 1960, @ 77	0.00	23,100.00
126		Accrued interest	0.00	405.00
127	$ 10,000.00,	face value, 4½% "B" Republic Steel Corporation bonds due 1961 @ 104⅛	0.00	10,412.50
127		Accrued interest	0.00	172.50
128	$ 3,800.00,	face value, 6%, Shaffer Oil and Refining Co. notes, due 1933, @ 49½	0.00	1,881.00
129	$ 5,000.00,	face value, 6%, Standard Gas & Electric Co. gold notes, due 1948, @ 69¾	0.00	3,4387.50
129		Accrued interest	0.00	46.00

22

130	$ 6,000.00,	face value, 5%, Telephone Service Co. of Ohio bonds, due 1933, @ 79¼	0.00	4,755.00
130		Accrued interest	0.00	40.00

131—	$ 10,000.00,	face value, 5½%, Twin City Rapid Transit Co. bonds, due 1952, @ 61	0.00	6,100.00
131—		Accrued interest	0.00	27.50
132—	$ 11,700.00,	face value, 6%, Village of Dalton, Illinois Imp. bonds, Ser. I @ 20	0.00	2,340.00
133—	$ 4,750.00,	face value, 6%, Village of Dalton, Ill., Imp. bonds, Ser. H @ 20	0.00	950.00
134—	$ 2,530.46,	face value, 6%, Village of Homewood, Ill., Special Assessment bonds	0.00	1,935.00
135—	$ 30,000.00,	face value, 5%, Western Pacific Railroad Co. bonds, due 1946, @ 14½	0.00	4,350.00
136—		Due from Fullerton Amusement Co.	0.00	8,500.00
137—		First Mortgage note, Barbara Kutten (flat)	0.00	8,000.00
138—		First Mortgage note, Joseph Hopp, et al (flat).	0.00	2,135.00

It is held that decedent made a transfer of the property represented by the above items 1 to 138, inclusive, to take effect in possession or enjoyment at or after his death, and the said items are, therefore, included in decedent's gross estate pursuant to Section 811(c) of the Internal Revenue Code.

The determined value of each of the above items represents the fair market value thereof as of the applicable valuation date and is based upon reliable information procured by this office during the course of investigation. Accrued interest to date of death and dividends payable subsequent to decedent's death to holders of record of a date prior to decedent's death have been included as to certain items.

Debts of decedent	Returned	Determined
Item 12	$2,276.98	2,243.85

The claimed deduction is allowed in the amount paid by the estate.

22 *Exhibit A.*

23 Computation of Tax.

	Returned	Determined	
Gross Estate for basic tax	$983,342.20	2,133,498.28	
Deductions	141,299.39	141,266.26	
Net estate for basic tax	841,042.81	1,992,232.02	
Net estate for additional tax	901,042.81	2,052,232.02	
1. Gross basic tax		132,800.88	
2. Credit for gift tax		0.00	
3. Gross basic tax, less gift tax credit		132,800.88	
4. Credit for estate and inheritance tax		0.00	
5. Basic tax net			132,800.88
6. Total gross taxes (basic and additional)		577,448.17	
7. Gross basic tax		132,800.88	
8. Gross additional tax		444,647.29	
9. Credit for gift tax		0.00	
10. Net additional tax			444,647.29
11. Total net basic and additional taxes			577,448.17
12. Defense tax			57,744.82
13. Total tax payable			635,192.99
Total tax shown on return			180,404.41
Deficiency			$454,788.58

Upon receipt of a waiver, or upon the expiration of 90 days from the date of this letter, if a petition is not filed with The Tax Court of the United States, $393,175.97 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by

credit for State, estate, inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Section 81.9, of Regulations 105. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise, when the credit evidence may be expected.

The deficiency bears interest at the rate of 6 per cent per annum from 15 months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

26 THE TAX COURT OF THE UNITED STATES

(Caption—1662)

ANSWER.

(Filed July 3, 1943.)

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled cause, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations of paragraph 3 of the petition, except it is admitted that the taxes in question are estate taxes.

4. (a), (b), (c), and (d). Denies that the determination of the tax set forth in the notice of deficiency is based upon the errors alleged in subparagraphs (a), (b), (c), and (d) of paragraph 4 of the petition or upon any errors.

27 5 (a.) Admits that on January 2, 1920, the decedent, Sidney M. Spiegel, executed an Indenture of Trust naming Modie J. Spiegel and Sidney M. Spiegel as trustees; that a copy of said trust indenture is attached to the petition as Exhibit B; that the Commissioner has determined that the transfers to the said trust were intended to take effect in possession and enjoyment at or after the grantor's death, and also that the executors filed

their Federal estate tax return with the Collector of Internal Revenue for the First District of Illinois, and that said Federal estate tax return disclosed a tax liability of $180,404.41. Denies the remaining allegations of subparagraph (a) of paragraph 5 of the petition.

5 (b), (c), and (d). Denies the allegations of subparagraphs (b), (c), and (d) of paragraph 5 of the petition.

Denies, generally and specifically, each and every allegation contained in the petition not heretofore admitted, qualified, or denied.

Wherefore, it is prayed that the Court redetermine the deficiency herein to be the amount determined by the Commissioner, viz.: $454,788.58.

(Signed) J. P. Wenchel.
J.D.K.
J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
F. R. Shearer,
Division Counsel.
Harold H. Hart,
Special Attorney, Bureau of Internal Revenue.

28 THE TAX COURT OF THE UNITED STATES

(Caption—1662)

MOTION TO AMEND PETITION

(Filed at Hearing, September 24, 1944.)

Now come petitioners, by their attorney, and move to amend the petition filed in this cause by substituting the sum of $20,000.00 in lieu of the sum of $10,000.00 in paragraphs 4(d) and 5(d) of the said petition, respectively, and in support of said motion state that the above amendment is made to conform the petition to the stipulated proof in the above cause.

Respectfully submitted,
Harry Thom,
Attorney for Petitioners.

29 THE TAX COURT OF THE UNITED STATES

(Caption—1662)

STIPULATION OF FACTS.

(Filed at Hearing, September 26, 1944.)

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel of record, that the following facts may be considered as true, and the exhibits hereinafter mentioned may be considered as admitted in evidence, without further proof, subject to the right of either party to object on the grounds of materiality and relevancy and to the right of either party to introduce further evidence not inconsistent herewith:

1. Sidney M. Spiegel, a resident of Winnetka, Illinois, who was born on August 16, 1872, died testate on December 19, 1940, his two daughters, Katherine J. Spiegel
30 and Julia S. Michels, his son, Sidney M. Spiegel, Jr., and his three grandchildren (children of Julia S. Michels), Robert Michels, Jr., Helen Katherine Michels and Sydney Ann Michels survive him. Said persons were living at Sidney M. Spiegel's death and the dates of their birth are as follows:

Katherine J. Spiegel, March 1, 1897.
Sidney M. Spiegel, Jr., August 8, 1904.
Julia S. Michels, March 7, 1907.
Robert Michels, Jr., August 21, 1930.
Helen Katherine Michels, November 17, 1936.
Sydney Ann Michels, November 14, 1938.

2. During his lifetime and on January 2, 1920, Sidney M. Spiegel executed an indenture with Modie J. Spiegel and Sidney M. Spiegel, as trustees, a copy of which indenture is attached hereto and marked "Exhibit 1" and by express reference thereto made a part hereof. The property embraced in said trust was delivered to, and the trust was accepted by, said trustees on said date. From the inception of the trust in 1920 to the date of death of the decedent, the income of the trust was distributed to or for the benefit of the decedent's three children.

3. The petitioners, Sidney M. Spiegel, Jr., Kather-
31 ine J. Spiegel and Robert Michels, who are residents of the State of Illinois, as executors of the Estate of Sidney M. Spiegel, deceased, filed a Federal estate tax return on March 19, 1942 with the Collector of Internal

Revenue at Chicago, Illinois, showing a net taxable estate of $841,042.81 for the basic tax and a net taxable estate of $901,042.81 for the additional tax, the executors having elected to value the property as of one year from the date of death under subdivision (j) of Section 811 of the Internal Revenue Code. The tax shown on said return to be due of $180,404.41 was paid to said Collector on March 19, 1942. A copy of said estate tax return is attached hereto and marked "Exhibit 2" and by express reference thereto made a part hereof.

4. The petitioners did not include in the said estate tax return, as subject to Federal estate tax, the corpus or any part of the corpus owned and held by the trustees under the said indenture dated January 2, 1920.

5. The Commissioner of Internal Revenue in his notice of deficiency, a true copy of which is attached to
32 the petition herein marked "Exhibit A" and which is incorporated herein by reference, was mailed to the petitioners on February 16, 1943. In said notice of deficiency, the Commissioner included on pages 2 to 9, both inclusive, under "Transfers" the sum of $1,140,606.30 representing the fair market value of the entire trust corpus and accumulated income owned and held by the trustees of the trust on December 19, 1940, and increased the gross estate of the decedent subject to estate tax by said amount.

6. Following the death of the decedent the entire corpus and the accumulated income was distributed equally to the three children of Sidney M. Spiegel.

It is agreed between the parties that for the purposes of subdivision (j) of Section 811 of the Internal Revenue Code, the distribution of the property of said trust to the three beneficiaries, Sidney M. Spiegel, Jr., Katherine J. Spiegel and Julia S. Michels, was made as of the date of death of the decedent.

7. The transfers of the property to the trust on January 2, 1920 were not made in contemplation of death.
33 8. It is agreed that the petitioners are entitled to a deduction from the gross estate of $20,000.00 for executors' fees allowed by the Probate Court of Cook County and which have been paid.

Harry Thom,
Attorney for Petitioner.

(Signed) J. P. Wenchel,
J.D.K.
Attorney for Respondent.

36 Official Report of Proceedings

Before

THE TAX COURT OF THE UNITED STATES

(Caption—1662)

(Filed October, 25, 1944)

Place: Chicago, Ill.
Date: September 26, 1944.

Pages 1 to 16.

38 BEFORE THE TAX COURT OF THE UNITED STATES

(Caption—1662)

1212 Lake Shore Drive
Chicago, Illinois,
Tuesday, September 26, 1944,
4:35 p. m.

(Met pursuant to notice.)

Before: Honorable J. M. Sternhagen, Judge.

Appearances:

Harry Thom, 231 South LaSalle Street, Chicago, Illinois, appearing on behalf of Estate of Sidney M. Spiegel, Petitioners.

Harold H. Hart, (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent.

39 PROCEEDINGS

The Court: Docket No. 1662, Estate of Sidney M. Spiegel. Who appears for petitioner?
Mr. Thom: Harry Thom.
The Court: And for respondent?
Mr. Hart: Harold H. Hart.
The Court: Proceed.

OPENING STATEMENT ON BEHALF OF THE PETITIONER

By Mr. Thom

Mr. Thom: If the Court please, this is an estate tax case involving an estate tax deficiency arising principally from the inclusion in the gross estate of the decedent by the Commissioner of a trust which was created by the decedent in his lifetime.

The issue involved, briefly, is the so-called right of reverter by operation of law. In other words, there is no express right of reverter in this trust. It is a very simple, two-page trust agreement.

Sidney M. Spiegel, the decedent, created this trust—

The Court: Is that the same as a case that has recently been decided?

Mr. Thom: It is the same issue, yes, sir, definitely.

The Court: What is the case? The most recent?

Mr. Thom: The most recent is the Biddle case. I have some more here which I can refer you to.

The Court: Cass, is that one? Well, that is all right. The Biddle case was this summer?

Mr. Thom: That is correct. There are some subsequent cases.

The Court: That is all I want to know.

Mr. Thom: Sidney M. Spiegel created this trust on January 2, 1920. It is a trust for the benefit of his three children. They were to receive the income of this trust until his death, and upon his death the corpus was to be divided between them equally. If at that time one of his children did not survive him that deceased child's share was to go to his children. If that deceased child died without any children surviving, then, it was to go to his other children, or if they were not surviving, to their descendants.

Mr. Spiegel died in 1948, and immediately after the date of his death the trust was distributed to his three children who were living at that time. In addition to the three children who were living at that time, one of his daughters had three children, who were Sidney M. Spiegel's grandchildren.

The Court: This daughter was a deceased child or was living? There were no living children of deceased children?

Mr. Thom: That is correct.

The Court: All of his children survived him?

41 Mr. Thom: All of his children survived him, and one of the surviving daughters had three children.

The Court: I see.

Mr. Thom: The executors did not include this trust in the gross estate. The respondent, the Commissioner, did include it in the notice of deficiency.

In addition, there are three other issues; namely, additional attorney's fees, additional administrative expenses and executors' fees.

The first two issues I mentioned, the additional attorney's fees and the additional administrative expenses, are being waived.

It is stipulated, however, the executors are entitled to a deduction from the gross estate of executors' commissions of $20,000.

Practically all of the facts in the case have been stipulated and I now offer the said stipulation of facts.

The Court: That is received.

Mr. Hart: Your Honor—

Mr. Thom: I am not through with the offer yet.

Mr. Hart: Go ahead. Make your offer.

Mr. Thom: I also offer the estate tax return, the original, which is called Exhibit 2 in the stipulation. I understand Mr. Hart will withdraw that and submit a photostatic copy.

42 Mr. Hart: May I have that privilege?

The Court: You may.

Mr. Thom: Do you want to add anything by way of an opening statement?

Opening Statement on Behalf of the Respondent.

By Mr. Hart.

Mr. Hart: Your Honor, as I conceive the question it is whether the value of the corpus of this estate as of the date of death—the corpus of the trust estate—should be included within the provisions of 811 (c) of the Revenue Code, and specifically those provisions which are worded, intended to take effect or possession or enjoinment at or after his death.

In this case the attorney for petitioner stated what hap-

pened to the income during the life of the petitioner. There was a life estate which ended with his life; the children getting the income. Then at his death the corpus was to go in the following fashion:

"Upon my death, the said trustees, * * * shall divide said trust fund, and any accumulated income thereon then in the hands of said trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of said deceased child of mine shall receive the share of said trust fund to which its or their
43 parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita."

The Court: That last provision you rely upon to bring it within the gross estate, I suppose?

Mr. Hart: We contend this transfer was intended to take effect or possession at or after death. No beneficiary named here would receive anything unless that beneficiary survived the death of the settlor, and if the beneficiary died prior to the settlor, then, he had not given the corpus away, and only gave the corpus away conditionally. So we say within the literal wording of 811 (c), this should be included in the gross estate and taxed.

The Court: I suppose this is like the Biddle case?

Mr. Hart: This is like the Biddle case?

The Court: Yes, the Biddle case.

Mr. Hart: No; these cases are all different.

The Court: They are all different in fact. Are they any different in principle?

Mr. Hart: I have read very many cases on this. I haven't run up—I can find one exactly like this. This
44 recent Stinson case is something like it. There was express provision in there, though, if certain beneficiaries died prior to the settlor, he had power of assignment. That is the Third Circuit Court decision.

The Court: The Lloyd case in the Third Circuit is also something like that, isn't it? They have the Stinson case on one side and the Lloyd case on the other. They are both something like that.

Mr. Hart: In my mind, I can't reconcile the cases.

The Court: Can you reconcile those two cases, the Lloyd case and the Stinson case—

Mr. Hart: I have notes on this Lloyd case.

The Court (continuing): —by the same court within a few months of each other? Don't take time.

Mr. Hart: I haven't the facts in the Lloyd case.

The Court: The transcript will show I have asked that question. You can reply when you file your brief.

Mr. Hart: I notice one thing, the Lloyd case is mentioned—no, that is mentioned—yes, the Lloyd case is mentioned by the Court in the Stinson case.

Mr. Thom: I would like to call the Court's attention to the Flora Lasker case in this circuit, which the Commissioner has had published in his Internal Revenue Bulletin. As I understand that procedure, that is tantamount to acquiescence. I can't understand his position in pre-
45 senting this case.

The Court: It would be beyond me to attempt to enlighten you on that.

Mr. Thom: I would also like to stipulate some actuarial figures in connection with this case.

Mr. Hart: Your Honor, I am going to object to the introduction of these actuarial factors. As I understand the factors they measure the probability of one factor of the settlor, a man at this age, just prior to his death, outliving six other people. We are trying to put the whole of the corpus of the trust into the estate. The only value of these factors would show the possibility of a man of sixty-eight outliving all these beneficiaries would be remote. The Court knows that by just having the problem given to him. There is no need for actuarial help. Is the Court going to decide these questions, if remoteness is the question, on a mathematical formula and tell us it is .005 on one side of the fence, if it is some other fraction on the other side of the fence? I don't think the Court needs this sort of testimony in a case of this kind.

The Court: In the first place, I can only speak for this Court, and certainly cannot speak for any court of appeal as to whether or not that actuarial data is a means of determining the remoteness or proximity of the survival. If you are asking me, that is the answer.

46 Mr. Thom: Subject to that objection—in other words, he is not objecting?

The Court: I didn't hear any objection. It may be I heard some—

Mr. Hart: I am objecting to the introduction of these actuarial factors as irrelevant and immaterial.

The Court: I will not exclude them. I will overrule the objection.

Mr. Hart: May I have an exception, please?

The Court: Yes.

Mr. Thom: Subject to that objection, it is stipulated as follows: The value computed on the basis of the mortality table and on the basis of the assumed interest rate prescribed in the Treasury Regulations applicable to Federal estate taxes of the right of a person aged sixty-eight years, to receive $1.00 on the date of death of the one last to die of six other persons, aged respectively, 44, 36, 34, 10, 4, 2 years, provided said person aged 68 years would survive all of the six other persons, is .00007384.

The Court: Is that stipulated, Mr. Hart?

Mr. Hart: Yes?

The Court: Subject to your—

Mr. Hart: Our actuaries agree on this figure.

The Court: I don't care if it is stipulated.

47 Mr. Hart: We do agree on those figures.

Mr. Thom: There is another stipulation involving an actuarial factor. I suppose you have the same objection?

Mr. Hart: The same objection. The same ruling?

The Court: Yes.

Mr. Thom: It is further stipulated that the probability computed on the basis of the mortality table prescribed by Treasury Regulations applicable to Federal estate taxes, that a person aged 68 years will survive six other persons of the ages of 44 years, 36 years, 34 years, 10 years, 4 years, 2 years, respectively, is .00015635.

The Court: Is that stipulated, Mr. Hart?

Mr. Hart: I agree.

The Court: Subject to your objection?

Mr. Hart: Yes, your Honor.

Mr. Thom: Now, if the Court please, I have one witness, Mr. Carl Meyer.

Whereupon, CARL MEYER, called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Thom.

Q. Will you state your name, please?

48 A. Carl Meyer.

Q. You are a partner in the law firm of Meyer, Mayer, Austrian and Platt?

A. I am.

Q. Were you one of the partners in the same firm in 1919 and 1920?

A. I was.

Q. Was Sidney M. Spiegel, petitioner in this case, a client of yours in 1919 and 1920?

A. When you say petitioner in this case,—he is dead. He is not petitioner.

Mr. Thom: He is petitioner in this case, Sidney M. Spiegel.

The Court: No, he is dead.

By Mr. Thom:

Q. Was Sidney M. Spiegel a client of yours in 1919 and 1920?

A. Yes.

Q. In the latter part of 1919, did he consult you in reference to the creation of a trust for the benefit of his three children?

A. He did.

Q. I show you Exhibit 1 attached to the stipulation of facts filed in this case and ask you whether you drafted that instrument?

49 A. I drafted the instrument of which that is a copy.

Q. That was drafted on or before January 2, 1920, the date it bears?

A. It was.

Q. Will you state whether or not you had any instructions from Mr. Sidney M. Spiegel with reference particularly to the divesting himself from complete ownership of the property transferred under that trust or under that agreement?

A. Mr. Spiegel, the creator—

Mr. Hart: Just a moment. Will you answer yes or no?
The Witness: I didn't hear you.
The Court: Do you remember the question?
The Witness: Yes, I think I remember it.
The Court: Could you answer it yes or no?
The Witness: I will answer it, "Yes". He asked whether I had any instructions.

By Mr. Thom:

Q. What were those instructions?
Mr. Hart: I am going to object, if the Court please. The instrument speaks for itself, and this evidence would be evidence in the nature of oral evidence, and it would tend to vary the terms of this instrument. The lawyer who drew the instrument is presumed to have drawn it in accordance with the instructions of his client.
50 The Court: I will overrule the objection.
Mr. Hart: May I have an exception?
The Court: You always have an exception to any adverse ruling.
Mr. Hart: Thank you.
The Witness: Mr. Spiegel, the settlor or creator of the trust, on several occasions prior to my drawing this instrument stated to me that he desired and intended that this property should be transferred to the trustees for the benefit of his children, and that he wanted at no time to have any interest or title to the property, and I endeavored as best I could to carry out those instructions. I might add that I believe I did.

By Mr. Thom:

Q. Did Mr. Spiegel intend to retain any reversionary or other interest in the property transferred to the trust?
Mr. Hart: I object to that.
The Court: I will sustain the objection.
Mr. Thom: That is all.
The Court: Any cross-examination?
Mr. Hart: Yes, your Honor.

Cross-Examination by Mr. Hart.

Q. In your opinion the language you used was the language which your client intended you to put in that
51 instrument to express his desire?
A. I did not so testify.

The Court: He is asking you whether that is your opinion.

The Witness: How is that?

The Court: He is asking you whether that is your opinion now. Can you answer whether it is or not?

The Witness: Will the reporter read the question?

(The question was read by the reporter.)

The Witness: It was not. That question, if I understand it correctly, puts in the mouth of the client the express language that I as a lawyer put into the instrument to carry out the intent that he wanted to have in the instrument. I had no discussion with him as to what language I should put in the instrument.

By Mr. Hart:

Q. But after discussing the matter with him and hearing of his intention you were of the opinion and are still of the opinion the language used carried out that intention—

A. Yes, sir.

Q. (Continuing.) —are you not?

A. Yes, sir.

Mr. Hart: That is all.

The Court: That is all.

The Witness: I may disagree with some of the 52 decisions.

(Witness excused.)

The Court: Anything more, Mr. Thom?

Mr. Thom: That is all.

The Court: Has the respondent any evidence?

Mr. Hart: Yes, your Honor. Respondent is now going to submit an actuarial computation.

Mr. Thom: I am objecting to the materiality and relevancy of this actuarial factor which Mr. Hart is now stipulating to. I don't disagree with the factor itself.

The Court: Mr. Hart, what you are doing is offering to stipulate?

Mr. Hart: I am offering to stipulate this fact.

The Court: All right. Mr. Thom objects to it, but he is going to stipulate to the facts over his objection.

Mr. Hart: The first factor reads: The probability computed on the basis of the mortality table prescribed in Treasury Regulation applicable to Federal estate taxes, that a person aged 47 years will survive three (3) other

persons of the age of 13 years, 15 years, 23 years, is .01612.

The Court: I will overrule the objection.

Mr. Hart: The second factor is the value computed on the basis of the mortality table and on the basis of the assumed interest rate prescribed in the Treasury Regulation applicable to Federal estate taxes of the right of a
53 person aged 47 years, to receive $1.00 on the date of the death of the one last to die of three other persons aged respectively 13 years, 15 years, 23 years is .00390.

The Court: Mr. Hart, give that to the reporter.

That stipulation, Mr. Thom, is subject to your objection, is that correct?

Mr. Thom: Yes.

The Court: Objection overruled.

Mr. Hart: That ends my case.

The Court: Very well. You may file your briefs under the rules.

(Whereupon, at 5:00 o'clock p. m., Tuesday, September 26, 1944, the hearing in the above-entitled matter was completed.)

54 EXHIBIT 2

Original

Form 706 — Treasury Department — Internal Revenue Service (Revised October 1941)

Estate Tax Return

(To be executed and filed in duplicate)

Decedent's name Sidney M. Spiegel.

Date of death December 19, 1940.

Residence at time of death 440 Sheridan Road, Winnetka, Illinois.

Citizenship at time of death United States of America.

General Instructions

Statute and General Description

Federal estate taxation under the Internal Revenue Code (chapter 3), applicable to estates of decedents dying on or after February 11, 1939, consists of, first, the basic estate

tax (subchapter A), second, the additional estate tax (subchapter B), and, third, the defense tax (subchapter C, as added by the Revenue Act of 1940, and repealed by the Revenue Act of 1941—restricted to estates of decedents dying between June 25, 1940, and September 21, 1941). Prior estate tax statutes are applicable to the estates of decedents who died before February 11, 1939.

In the case of a citizen or resident of the United States, a specific exemption of $40,000 is authorized for the purpose of the basic estate tax and one of $40,000 is authorized for the purpose of the additional tax. No specific exemption is authorized if the decedent was a nonresident alien of the United States.

A credit is authorized against the basic estate tax (not in excess of 80 percent thereof) for estate, inheritance, legacy, or succession taxes paid a State, Territory, or the District of Columbia (or, if the decedent died after June 29, 1939, a possession of the United States). No credit is allowable against the additional estate tax for estate, inheritance, legacy, or succession taxes paid a State, Territory, the District of Columbia, or any possession of the United States.

Credits for Federal gift taxes are, under certain conditions and limitations, allowable against both the basic and the additional estate taxes.

The Federal estate tax is neither a property nor an inheritance tax. It is imposed upon the transfer of the entire net estate and not upon any particular legacy, devise, or distributive share. The relationship of the beneficiary to the decedent has no bearing on the question of liability or the extent thereof. The transfer of property is taxable although it escheats to the State for lack of heirs.

Return Required for Estate of Resident or Citizen

A return on this form must be filed for the estate of every resident or citizen of the United States whose gross estate as defined by the statute exceeded $40,000 in value at the date of death.

The value of the gross estate at the date of the decedent's death governs the liability for the filing of the return regardless of any valuation as of a subsequent time that may be adopted by the executor under the provisions of section 811 (j) of the Internal Revenue Code.

Return Required for Estate of Nonresident Alien

A return on this form is required for the estate of every nonresident alien decedent if any part of the gross estate was situated, within the meaning of the statute, in the United States. No specific exemption is authorized in the case of a nonresident alien.

Time and Place for Filing Return

The return is due 15 months after the date of the decedent's death. The return for the estate of a resident decedent must be filed with the collector in whose district the decedent had his domicile at the time of death. The return for the estate of a nonresident decedent must be filed with the collector in whose district the gross estate in the United States was situated; or, if the gross estate in the United States was situated in more than one district, or, if in the case of a nonresident citizen no part of the gross estate was situated in the United States, it must be filed with the Collector for the Second District of New York, or with such collector as the Commissioner may designate.

Payment of Tax

The tax is due 15 months after the date of the decedent's death, and must be paid within such period unless an extension of time for payment thereof has been granted by the Commissioner. Check or money order in payment of the tax should be made payable to "Collector of Internal Revenue at ....," naming city and State in which is located the office of the collector with whom the return is filed.

Gross Estate

In addition to property passing under a will or the intestate laws, the gross estate for the purpose of the estate tax includes, as more specifically explained hereinafter, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which

the decedent exercised a general power of appointment, and dower, curtesy, or statutory estate in lieu thereof, of the surviving spouse.

Property Situated in the United States

In the case of the estate of a nonresident alien the statute reaches only property situated in the United States at the time of death, except that property transferred during the decedent's life and described under Schedule G is included if such property was situated in the United States either at the time of the transfer or at the time of death. The term "United States," when used in a geographical sense, includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia. Real estate and tangible personal property are situated in the United States if physically therein. Written evidences of intangible property which are treated as being the property itself, such as certificates of stocks or bonds, constitute property situated in the United States if physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located. Intangible personal property the written evidence of which is not treated as being the property itself, such as a simple debt or open account, constitutes property within the United States if consisting of a property right issuing from or enforcible against a resident of the United States or a domestic corporation (public or private). However, under an express provision of the statute (section 863 of the Internal Revenue Code), proceeds of insurance upon the life of a nonresident alien, and bank deposits of a nonresident alien who was not engaged in business in the United States at the time of his death, are not regarded as property situated in the United States.

Supplemental Documents

If the decedent was a resident and died testate, two copies of the will, one of them certified, must be filed.

If the decedent was a nonresident citizen, the following documents must be filed with the return:

(1) A copy of the inventory of property and the schedule of liabilities, claims against the estate and expenses of

administration filed with the foreign court of probate jurisdiction, certified by a proper official of such court.

(2) A copy of the return filed under the foreign inheritance, estate, legacy, succession tax, or other death duty act, certified by a proper official of the foreign tax department, if the estate is subject to such a foreign tax.

(3) If the decedent died testate, a certified copy of the will.

If the decedent was a nonresident alien, the following documents must be filed:

(1) If deductions are claimed, certified copies of the inventory and schedule or a certified copy of the return, as described in the preceding subparagraphs (1) and (2).

(2) If the decedent died testate, a certified copy of the will.

Other supplemental documents may be required as hereinafter explained under the instructions for the several schedules.

Execution of Return

This form consists of the cover sheets and 19 inside sheets numbered in consecutive order. A complete set should be used for every copy of the return required. For convenience in typing carbon copies the sets as issued may be readily separated and the corresponding sheets matched. When completed, each copy of the return to be filed must be permanently fastened together with all sheets in proper order. Any suitable type of paper fastener may be utilized for this purpose. Ordinary wire staples are recommended for the return of average size. The return must be filed in duplicate. All sheets provided, numbered I to XXI, must be included.

Write only on one side of each sheet of paper. If there is not sufficient space for all entries under any of the printed schedules, use additional sheets of the same size, and insert in the proper order in the return. All information required, as indicated under "General Information," must be supplied in the spaces provided. The questions asked under each schedule must be specifically answered, and if the decedent owned no property of any class specified for the schedule, the word "None" should be written across the schedule.

The gross estate must be set forth under the appropriate Schedules A to I. The deductions, except amounts claimed

for the specific exemptions and property previously taxed, should be shown under the appropriate Schedules J to N. The amounts deducted for the specific exemptions and property previously taxed should be shown under Schedules P and Q, or under Schedule R. If the gross estate of a resident or citizen exceeds $400,000 the net estate for the basic tax should be computed under Schedule P. The net estate for the additional tax on the estate of a resident or citizen should be computed under Schedule Q. The net estate for a nonresident alien should be computed under Schedule R.

For every item of principal, any interest or rent accrued thereon at the date of the decedent's death and any outstanding dividends declared to stockholders of record on or before such date must be separately entered under the column headed "Value at date of death"; and, if the optional valuation is adopted, any includible income with respect to each item of principal, as hereinafter explained, must be separately entered under the column headed "Value under option."

The items should be numbered under every schedule and a separate enumeration should be used for each schedule. The total for each schedule should be shown at the bottom of the schedule. The totals should not be carried forward from one schedule to another, but the total or totals for each schedule should be entered under the Recapitulation, Schedule O.

The information indicated by the columns headed "Subsequent valuation date" and "Value under option" should not be shown unless the executor adopts the optional valuation authorized by section 811 (j) of the Internal Revenue Code. If such optional valuation is not adopted the space in the columns headed "Subsequent valuation date" and "Value under option" may be utilized for descriptive matter, as indicated in the examples shown under the instructions for Schedules A and B. Similar information should be omitted in the space provided therefor under the Recapitulation, Schedule O, if the optional valuation is not adopted.

The computation of the tax must be shown in detail as indicated on sheet XX. If the executor determines no liability for tax, the word "None" should be shown at item 11 under "Computation of Tax."

The filing of this form will not be considered the filing of a complete return as required by the statute and the

regulations issued pursuant thereto unless all the information as indicated herein is set forth.

If there is more than one executor or administrator, all must sign and swear to (or affirm) the return. The affidavit may be sworn to before any person authorized to administer oaths except the attorney or attorneys representing the taxpayer. If the officer has an official seal, such seal must be affixed.

If there is no executor or administrator appointed, qualified, and acting in the United States, every person in actual or constructive possession of any property of the decedent is constituted by the statute an executor for the purposes of the tax (section 930 (a) of the Internal Revenue Code), and is liable for the filing of the return. If two or more persons are liable for the filing of the return, it is preferable for all to join in the filing of one complete return, but if they are unable to join in making one complete return, each is required to file a return disclosing all the information he has in the case, including the name of every person holding an interest in the property and a full description of such property. If the appointed, qualified, and acting executor or administrator is unable to make a complete return, the statute requires that every person holding an interest in the property shall, upon notice from the collector, make a return as to such interest.

The person or persons who file the return must, in every case, execute the first affidavit on sheet XX of both the original and duplicate copies. If the return is prepared by an attorney or agent for the person or persons filing this return, the second affidavit on sheet XX of both copies must also be executed, and executed only by such attorney or agent.

If the taxpayer desires to be represented by an attorney, by correspondence or otherwise, a power of attorney must be filed. For this purpose, Form 711, obtainable from any collector, may be executed.

Valuation

Unless the executor elects otherwise at the time the return is filed, all property included in the gross estate must be valued as of the date of the decedent's death.

Optional Valuation

If the executor elects to adopt the valuation authorized by section 811 (j) of the Internal Revenue Code, such election must be expressly indicated in the space provided under "General Information." The election cannot be exercised unless the return is filed within fifteen months after the decedent's death or within the period for filing the return as extended by the Commissioner or the collector under the authority of the law and regulations prescribed for such extensions.

In general, the object of section 811 (j) of the Internal Revenue Code is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

The executor may, by an election duly made upon this return, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within 1 year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date 1 year after the date of the decedent's death;

(3) Any property, interest, or estate which is "affected by mere laspe of time," valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date 1 year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever first occurs.

Property "distributed" is limited to distributors thereof by the executor, or by the trustee in the case of property included in the gross estate under subsections (c), (d), or (f) of section 811 of the Internal Revenue Code. (Subsections (c) and (d) pertain to certain transfers during the decedent's life and subsection (f) pertains to property passing under a general power of appointment.) Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by

the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which the subdivision refers, may be one made by the executor, or by the trustee of property included in the gross estate under subsections (c), (d), or (f) of section 811, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee, or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms, 56 "distributed," "sold," "exchanged," "or otherwise disposed of," comprehend all possible ways by which property may be separated or passed from the gross estate.

The property to be valued as of 1 year after the date of decedent's death, or as of that date, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. It will be necessary in every case first to determine what property constituted the gross estate at decedent's death.

Interest accrued to the date of the decedent's death on bonds, notes, and other interest-bearing obligations constitutes property of the gross estate on the date of his death, and is to be included in the optional valuation. Interest accruing between the date of the decedent's death and the subsequent valuation date of the bond, note, or other obligation to which such interest pertains does not constitute property of the gross estate at the date of the decedent's death and is to be excluded from the optional valuation. However, any part payment of principal made after the date of the decedent's death and on or before the subsequent valuation date, or any advance payment of interest

for a period after the subsequent valuation date of the principal which has the effect of reducing the value of the principal obligation as of the subsequent valuation date constitutes a part of the gross estate and is to be included in the optional valuation.

Rent accrued to the date of the decedent's death on leased realty or personalty constitutes property of the gross estate on the date of his death and is to be included in the optional valuation. Rent accruing between the date of the decedent's death and the subsequent valuation date of the leased property does not constitute property of the gross estate at the date of the decedent's death and is to be excluded from the optional valuation. The principal stated above with respect to interest paid in advance also applies to advance payments of rent.

Outstanding dividends which were declared to stockholders of record on or before the date of the decedent's death constitute property of the gross estate on the date of his death and are to be included in the optional valuation. Ordinary dividends declared to stockholders of record after the date of the decedent's death do not constitute property of the gross estate at the date of his death and are to be excluded from the optional valuation. However, if dividends are declared to stockholders of record after the date of the decedent's death with the effect that the shares of stock at the subsequent valuation date do not reasonably represent the same property existing at the date of the decedent's death, such dividends are to be included in the optional valuation, except to the extent that such dividends are paid from earnings of the corporation after the date of the decedent's death.

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of another other than the decedent, remainders, reversions, and other like properties, interests, or estates. The phrase, "affected by mere lapse of time," has no reference to obligations for the payment of money, whether or not interest-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest, or estate so affected is, as prescribed in subsection (j), the date of decedent's death, but with an adjustment to be made of

the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or subtracts from the value at death any difference between that value and the value as of the date 1 year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. For further information and examples relative to the valuation of properties, interests, or estates which are affected by mere lapse of time, see the Estate Tax Regulations.

Deductions authorized under section 812 or section 861 of the Internal Revenue Code are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 812 (d) or 861 (a) (3) of the Internal Revenue Code, is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value 1 year after such death, or at the date of its sale or exchange. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or nonoccurrence of a contingency.

The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property.

In every case where the election is exercised, the return must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of such property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined as hereinbefore explained and in accordance with the regulations issued pursuant to subsection (j).

The foregoing information must be shown under the appropriate columns of each schedule. Under the column headed "Description" a brief statement for each item must be shown explaining the status or disposition governing the subsequent valuation date, such as, "Not disposed of within year following death," "Distributed," "Sold," "Bond paid on maturity," etc. Under this same heading a description of each item of principal and includible income must be entered separately. Under the heading "subsequent valuation date," the applicable date for each separate entry of principal and includible income must be shown. Under the heading "Value under option" the amount of the principal and the amount of includible income must be separately shown. In the case of any interest or estate, the value of which is affected by mere lapse of time such as patents, leaseholds, estates pur autre vie, or remainder interests, the value shown under the heading "Value under option" must be the adjusted value, i. e., the value as of the date of death with an adjustment reflecting any difference in its value as of the later date not due to mere lapse of time. Under the heading "Value at date of death" the amount of the principal and the amount of includible income must be entered separately.

For examples illustrating the entry of the information required under the schedules, see the reverse of sheets III and V. While the examples there shown pertain to Schedules A and B, the information required under the other schedules should be set forth in a similar manner.

All the information indicated on this form must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period after the decedent's death must be supported by evidence. If the court issues an order of distribution during that period a certified copy of the order must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

Penalties

For penalties for failure to file return when due, keep records, and supply information, or for the preparation or presentation or the aiding or assisting in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, see the Estate Tax Regulations.

Further Instructions

Detailed instructions pertaining to each schedule are included herein. For further information see the Estate Tax Regulations, a copy of which may be obtained from the Collector of Internal Revenue for your district.

57 General Information

Decedent's name Sidney M. Spiegel. Date of death December 19, 1940.

Residence (domicile) at date of death 410 Sheridan Road, Winnetka, Illinois.

Year in which last domicile was established many years ago.

Citizenship at date of death United States of America.

Place of death 410 Sheridan Road, Winnetka, Illinois.

Cause of death and length of last illness cancer—approximately 14 months.

Names and addresses of decedent's physicians. Herbert F. Binswanger—104 S. Michigan Ave., Chicago, Illinois.

If decedent was confined in a hospital during his last illness, give name and address of hospital No.

Date of birth August 16, 1872. Place of birth Chicago, Illinois.

Business or occupation retired.

Business address 540 N. Michigan Ave., Chicago, Illinois.

Married, single, separated, widowed, or divorced at date of death widowed.

Number of children three.

Heirs, Next of Kin, Devisees, and Legatees

(If more than five, only the names of the five principle ones are required)

Name	Relationship	Address
Katherine J. Spiegel, daughter	daughter	410 Sheridan Road, Winnetka, Illinois
Sidney M. Spiegel, Jr.	son	540 North Michigan Ave., Chicago, Ill.
Julia Spiegel Michels	daughter	160 Sheridan Road, Winnetka, Illinois

Did decedent die testate? yes.

Were letters testamentary or of administration granted for this estate? yes.

Date granted December 22, 1940.

Name and location of court Probate Court of Cook County, Illinois.

To whom granted? (Explain if different from the person or persons filing return.) Katherine J. Spiegel, Sidney M. Spiegel, Jr., Robert Michels.

Did the decedent at date of death own property in any State or country other than that of his last domicile? no.

Place of ancillary probate proceedings, if any no.

58 Name and address of ancillary administrator or executor none.

Did the decedent at the time of his death have a safe deposit box held either alone or in the joint names of himself and another? Michigan and Jackson Safe Deposit Company, 310 S. Michigan Ave.

Is so, state location Chicago, Ill.

If held jointly, give the name of the joint depositor and his relationship to the decedent held jointly—Katherine J. Spiegel, daughter had access to box.

If the decedent had a safe deposit box at the time of his death indicate under what schedules in this return the contents are listed B and C.

If any of the contents of the safe deposit box are omitted from the schedules, explain why none are omitted.

Did the undersigned person or persons filing return make diligent and careful search for property of every kind left by the decedent? yes.

Did the same undersigned make diligent and careful search for information as to any transfers of the value of $5,000 or more made by the decedent during his lifetime without an adequate and full consideration in money or moneys worth? yes.

Name and address of attorney representing estate, if any Mayer, Meyer, Austrian & Platt, 231 S. LaSalle Street, Chicago, Illinois.

Optional Valuation

Does the executor elect to have the gross estate of this decedent valued in accordance with values as of a date or dates subsequent to the decedent's death as authorized by section 811 (j) of the Internal Revenue Code? (Answer "Yes" or "No.") yes.

(Unless the answer to this question is "Yes," the property included in the gross estate must be valued as of the date of the decedent's death.)

Estate of Sidney M. Spiegel, deceased.

59 Instructions For Schedule A

Real Estate

Real estate should be so described and identified that upon investigation by an Internal Revenue officer it may be readily located for inspection and valuation. For each parcel of real estate there should be given the area, if the parcel is improved, a short statement of the character of the improvements. For city or town property state street and number, ward, subdivision, block and lot, etc. For rural property state township, range, landmarks, etc.

If any item of real estate is subject to a mortgage, the unpaid balance of the mortgage should be shown under "Description." The full value of the property, and not the equity must be extended in the value column. The amount of the mortgage should be deducted under Schedule L of this return.

Real property which the decedent has contracted to purchase should be listed in this schedule. The full value of the property and not the equity must be extended in the value column. The unpaid portion of the purchase price should be deducted under Schedule L of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof or on account of homestead or other exemptions should be made in returning the value of the real estate.

The basis for the returned values should be stated. If based upon appraisal a copy of such appraisal should either be attached to the return or retained in your files subject to inspection.

Examples Showing Use of Schedule A

Example where the optional valuation is not adopted: date of death, January 1, 1940

1	House and lot, 1921 William Street Nw., Washington, D. C. (lot 6, square 481). Rent of $900 due at end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached	$36,000
	Rent due on item 1 for quarter ending November 1, 1939, but not collected at date of death	900
	Rent accrued on item 1 for November and December 1939	600
2	House and lot, 304 Jefferson Street, Alexandria, Va. (lot 18, square 40). Rent of $100 payable monthly. Value based on appraisal, copy of which is attached	12,000
	Rent due on item 2 for December 1939, but not collected at date of death	100

Example where the optional valuation is adopted: date of death, January 1, 1940

Item No.	Description	Subsequent valuation date	Value under option	Value at date death
1	House and lot, 1921 William Street Nw., Washington, D. C. (lot 6, square 481). Rent of $900 due at end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached. Not disposed of within year following death.	1/1/41	$30,000	$36,000
	Rent due on item 1 for quarter ending November 1, 1939, but not collected until February 1, 1940	2/1/40	900	900
	Rent accrued on item 1 for November and December 1939, collected on February 1, 1940	2/1/40	600	600

Item No.	Description	Subsequent valuation date	Value under option	Value at date death
2	House and lot, 304 Jefferson Street, Alexandria, Va. (lot 18, square 40). Rent of $100 payable monthly. Value based on appraisal, copy of which is attached. Property exchanged for farm on December 1, 1940	12/1/40	10,000	12,000
	Rent due on item 2 for December 1939, but not collected until February 1, 1940	2/1/40	100	100

60 **Gross Estate**

Schedule A

Real Estate

Did decedent, at the time of his death, own any real estate in the United States (Answer "Yes" or "No.") Yes.

Lots Twelve (12), Thirteen (13) and Fourteen (14), (except that part lying East of a line fifty (50) feet West of and parallel with the East line of Section Seven (7), in Block One (1) in E. Calvin's Subdivision of the Southeast quarter (SE¼) of the Southeast quarter (SE¼) of the Southeast quarter (SE¼) of Section Seven (7), Township Thirty-eight (38) North, Range Fourteen (14) East of the Third Principal Meridian (3rd P. M.), commonly known as 5428-32 South Ashland Avenue, Chicago.

The property commonly known as No. 5428 South Ashland Avenue is improved with a brick building, containing one store on the ground floor, one four-room apartment on the second floor and a loft at the rear of the apartment. The property known as 5430-32 South Ashland Avenue is improved with a brick building, containing two stores. Title to both properties is unencumbered. $15,000.00

Total (also enter under the Recapitulation, Schedule O) $15,000,000.

(If more space is needed, insert additional sheets of same size)

Estate of Sidney M. Spiegel, deceased Sheet IV

61

Schedule B.

Stocks and Bonds.

(See Instructions on reverse of Sheet IV)

(1) Did the decedent, if a resident or citizen of the United States, own any stocks or bonds, regardless of situs, at the time of his death? (Answer "Yes" or "No.") Yes.

(2) Did the decedent, if a nonresident alien of the United States, own, at the time of his death, any stocks or bonds situated in the United States as explained in the instructions? (Answer "Yes" or "No.") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	2,900 shares Capital Stock of Air Reduction Company, Incorporated, a New York corporation, no-par value @ 41			$118,900.00
	1650 shares sold during year as follows:			
	200 shares	8-12-41	$8,358.32	
	150 shares	8-13-41	6,178.11	
	400 shares	8-14-41	16,491.65	
	600 shares	8-15-41	24,737.49	
	300 shares	8-22-41	12,368.75	
	1250 shares not sold during the year @ 37-3-16		46,484.37	

2.	2,000 shares Common Stock of Amalgamated Leather Companies, Inc., a Delaware corporation, par value $1.00 per share @ 1¼			2,250.00
	Not disposed of during year @ ⅝	12-19-41	1,250.00	
3.	900 shares of Common Stock of American Chain & Cable Company, Inc., a New York corporation, no par value @ 20¼			18,225.00
	Not disposed of during year @ 18¾	12-19-41	16,875.00	
4.	536 shares Capital Stock of American Telephone & Telegraph Company, a New York corporation, par value $100. per share @ 166¼			89,043.00
	Not disposed of during year @ 125-7/16	12-19-41	67,234.50	
Total (also enter under the Recapitulation Schedule O)			1st col. $	2nd col. $ 3rd col.

(If more space is needed insert additional sheets of same size.)

Estate of Sidney M. Spiegel, deceased.

62 Instructions for Schedule B—Continued.

Examples Showing Use of Schedule B

Example where the optional valuation is not adopted; date of death, January 1, 1940.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	Sixty $1,000 Arkansas Railroad Co. first mortage 4 percent, 20-year bonds, due 1950. Interest payable quarterly on February 1, May 1, August 1, and November 1. New York Exchange at 100			$60,000
	Interest coupons attached to bonds, item 1 due and payable on November 1, 1939, but not cashed at date of death			600
	Interest accrued on item 1, from November 1, 1939, to January 1, 1940			400
2.	Five hundred shares Public Service Corporation, common, par $100, at 110 ex dividend, New York Exchange			55,000
	Dividend on item 2 of $2 per share declared December 10, 1939, payable on January 10, 1940, to holders of record on December 30, 1939			1,000

Example where the option valuation is adopted; date of death, January 1, 1940.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	Sixty $1,000 Arkansas Railroad Co. first mortgage 4-percent, 20-year bonds, due 1950. Interest payable quarterly on February 1, May 1, August 1, and November 1. New York Exchange at 100 on date of death			$60,000
	Thirty of such $1,000 bonds distributed to legatees on August 1, 1940. New York Exchange at 99	8/1/40	$29,700	

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	Thirty of such $1,000 bonds sold by executors on September 1, 1940, at 99	9/1/40	29,700	
	Interest coupons attached to bonds, item 1, due and payable on November 1, 1939, but not cashed at date of death. Cashed by executor on February 1, 1940	2/1/40	600	600
	Interest accrued on item 1 from November 1, 1939, to January 1, 1940. Cashed by executor, February 1, 1940	2/1/40	400	400
2.	Five hundred shares Public Service Corporation, common, par $100. New York Exchange. At 110, ex dividend, on date of death. At 90 on January 1, 1941, not disposed of within year following death	1/1/41	45,000	55,000
	Dividend on item 2 of $2 per share declared December 10, 1939, and paid on January 10, 1940, to holders of record on December 30, 1939	1/10/40	1,000	1,000

63 Schedule B (continued).

5.	200 shares Common Stock of The Atlantic Refining Company, a Pennsylvania corporation, par value $25.00 per share @ 24			$4,800.00
	Not disposed of during year @ 25-15/16	12-19-41	$5,187.50	

6. 188 shares Capital Stock of Boeing Airplane Company, a Delaware corporation, par value $5.00 per share @ 17			3,196.00
Not disposed of during year at 18¾	12-19-41	3,525.00	
7. 800 shares Common Stock of Borg-Warner Corporation, an Illinois corporation, par value $5.00 per share @ 19			15,200.00
Not disposed of during year @ 20-1/16	12-19-41	16,050.00	
8. 1,000 shares Common Stock of Butte Copper Consolidated Mines, a South Dakota corporation	12-19-41	No value	No value
9. 600 shares Capital Stock of Caterpillar Tractor Co., a California corporation, no par value @ 49¾			29,925.00
Not disposed of during year @ 37¼	12-19-41	22,275.00	
10. 32 shares Capital Stock of Chicago National League Ball Club, an Illinois corporation, par value $100. per share @ 90	12-19-41		2,880.00
Not disposed of during year @ 80		2,560.00	

Estate of Sidney M. Spiegel, deceased.

64. Schedule B (cont'd.)

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
11.	120 shares Capital Stock of The Joseph Dixon Crucible Company, a New Jersey corporation, par value $100. each @ 30			$3,600.00
	Sold during year	8-5-41	$5,032.80	
12.	650 shares Common Stock of Dresser Manufacturing Company, a Pennsylvania corporation, no par value @ @ 21⅞			14,218.75
	Sold during year following death:			
	150 shares	8-25-41	2,885.69	
	100 shares	8-28-41	1,927.96	
	200 shares	8-29-41	3,855.92	
	200 shares not disposed of during year @ 12-13/16	12-19-41	2,562.50	
13.	306 shares Common Stock of E. I. duPont de Nemours & Company, a Delaware corporation, par value $20. per share @ 161½			49,419.00
	Not disposed of during year @ 139½	12-19-41	42,687.00	
14.	346 shares Common Stock of Electric Bond and Share Company, a New York corporation, par value $5.00 per share @ 3¾			1,340.75
	Sold during year	8-31-41	827.18	

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
15.	500 shares Common Stock of Eversharp, Inc., a Delaware Corporation, par value $1.00 per share @ 1⅞			937.50
	Not disposed of during year @ 2⅜	12-19-41	1,187.50	
Estate of Sidney M. Spiegel, deceased.				
16.	600 shares 5% Cumulative Preferred Stock of Eversharp, Inc., a Delaware corporation, par value $20. per share @ 7⅞			$4,725.00
	Not disposed of during year @ 8⅝	12-19-41	$5,175.00	
17.	700 shares Class A Common Stock of The Florsheim Shoe Company, an Illinois corporation, no par value @ 23			16,100.00
	Not disposed of during year @ 19⅛	12-19-41	13,387.50	
18.	500 shares Common Stock of Food Machinery Corporation, a Delaware corporation, par value $10 per share @ 31¼			15,562.50
	Not disposed of during year @ 32	12-19-41	16,000.00	
19.	905 shares Common Stock of General Motors Corporation, a Delaware corporation, par value $10. per share @ 49½			44,797.50
	Not disposed of during year at 29 11/16	12-19-41	26,867.19	

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
20.	348 shares Common Stock of The Glidden Company, an Ohio corporation, no par value @ 13⅝			4,741.50
	Sold during year	8-12-41	5,485.32	
	Estate of Sidney M. Spiegel, deceased.			
21.	600 shares Common Stock of The Goodyear Tire and Rubber Company, an Ohio corporation, no par value @ 18⅜			$11,025.00
	Not disposed of during year @ 11 6/8	12-19-41	$7,050.00	
22.	200 shares Common Stock of Investors Telephone Company, a Delaware corporation, no par value @ 16½			3,300.00
	Not disposed of during year @ 13	12-19-41	2,600.00	
23.	250 shares Common Stock of James Mfg. Co., a Wisconsin corporation, par value $25. per share at 19			4,750.00
	Not disposed of during year @ 19	12-19-41	4,750.00	
24.	500 shares Common Stock of Johns-Manville Corporation, a New York corporation @ 60		26,125.00	30,000.00
	Not disposed of during year @ 52¼	12-19-41	26,250.00	

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
25.	300 shares Capital Stock of Kennecott Copper Corporation, a New York corporation, no par value @ 35¼			10,537.50
	Not disposed of during year @ 35¼	12-19-41	10,537.50	
	Estate of Sidney M. Spiegel, deceased.			
26.	210 shares Capital Stock of Lake Shore Trust and Savings Bank, an Illinois corporation, par value $50. per share @ 74			$15,540.00
	Not disposed of during year @ 69½	12-19-41	$14,595.00	
27.	50 shares 6% Preferred Stock, of the par value of $55. per share, and 50 shares of Common Stock, without par value, of Metropolitan Industries Company @ 11			550.00
	Not disposed of during year @ 19	12-19-41	950.00	
28.	400 shares Common Stock of Motor Products Corporation, a New York corporation, no par value @ 11¼			4,500.00
	Not disposed of during year @ 5 15/16	12-19-41	2,375.00	
29.	50 shares First Preferred Series A 6% Preferred Stock of North American Car Corporation, an Illinois corporation, no par value @ 69			3,450.00
	Sold during year	11-8-41	4,936.00	
	Estate of Sidney M. Spiegel, deceased.			

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
30.	246 shares Common Stock of The North American Company, a New Jersey corporation, no par value @ 16½			$4,066.75
	Not disposed of during year @ 9 13/16	12-19-41	$2,413.88	
31.	250 shares in One La-Salle Company, an Illinois corporation @ 11½			2,875.00
	Sold during year	8-1-41	2,987.50	
32.	140.40 shares Common Stock of 110 South Dearborn Street Corporation, par value $10. per share, not sold during year	12-19-41	10,000.00	10,000.00
33.	2,700 shares Common Stock of Parker Rust Proof Company, a Michigan corporation, par value $2.50 per share @ 19½			52,650.00
	Sold during year:			
	1100 shares	8-21-41	19,369.60	
	900 shares	8-25-41	16,257.80	
	200 shares	8-26-41	3,565.62	
	500 not disposed of during year following death @ 14¾	12-19-41	7,375.00	
34.	533 shares Common Stock of Parker-Wolverine Company, a Michigan corporation, no par value @ 11¼			5,996.25
	Sold during year:			
	100 shares	8-20-41	733.98	
	233 shares	9-8-41	1,647.81	
	100 shares	9-25-41	708.98	
	100 shares	9-29-41	683.98	

Estate of Sidney M. Spiegel, deceased.

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
35.	375 shares Common Stock of Philip Morris & Co., Ltd., a Virginia corporation, par value $10. per share @ 77			$28,875.00
	Not disposed of during year @ 75¼	12-19-41	$28,171.88	
36.	750 shares Capital Stock of Phillips Petroleum Company, a Delaware corporation, no par value @ 40			30,000.00
	Not disposed of during year @ 45½	12-19-41	34,125.00	
37.	200 shares Common Stock of Pillsbury Flour Company, a New Jersey corporation, par value $25.00 per share @ 22½			4,500.00
	Not disposed of during year @ 13¼	12-19-41	2,650.00	
38.	600 shares Common Stock of St. Regis Paper Company, a New York corporation, par value $5.00 per share @ 2⅜			1,425.00
	Not disposed of during year @ 1 9/16	12-19-41	937.50	
39.	3,400 shares Common Stock of Standard Screw Company, a New Jersey corporation, par value $20. per share @ 41			139,400.00
	1700 shares sold during year following death:	8-4-41	64,579.60	
	1700 shares not disposed of during year following death at 45½	12-19-41	77,350.00	

Estate of Sidney M. Spiegel, deceased.

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
40.	1,000 shares Common Stock of Tide Water Associated Oil Company, a Delaware corporation, par value $10. per share @ 9½			
	Not disposed of during year @ 11 9/16			9,500.00
41.	250 shares Common Stock of 208 South La-Salle Street Corporation, a Delaware corporation, no par value @ 22½	12-19-41	$11,562.50	
	Not disposed of during year @ 21			5,625.00
42.	600 shares Capital Stock of United Aircraft Corporation, a Delaware corporation, par value $5. per share @ 42¾	12-19-41	5,250.00	
	Not disposed of during year @ 34¼			25,650.00
43.	333 shares Capital Stock of United Air Lines Transparent Corporation, a Delaware corporation, par value $5. per share @ 15	12-19-41	20,475.00	
	Not disposed of during year @ 9 15/16			4,995.00
44.	500 shares Common Stock of United Carbon Company, a Delaware corporation, without par value @ 47¼	12-19-41	3,309.18	
	Sold during year following death:			23,625.00
	Estate of Sidney M. Spiegel, deceased.	8-4-41	23,525.35	

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Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
45.	900 shares Common Stock of United States Steel Corporation, a New Jersey corporation, par value $100. per share @ 67⅞			
	Not disposed of during year @ 51¼	12-19-41	$46,125.00	$60,862.50
46.	6 units Washington Railway & Electric Company, Certificates of Beneficial Ownership @ 18⅜ at death			110.25
	Sold during year following death @ $13.50	7-31-41	81.00	
47.	2 $1,000.00 7% Sinking Fund Bonds of Banco Hipotecario de Colombia (Mortgage Bank of Colombia), due 11-1-46, with interest coupons due 11-1-32 and subsequent attached @ 22⅜			447.50
	Sold during year following death:	7-24-41	515.00	
48.	5 $1,000.00 4½% Drainage Sewer Bonds of City of Houston, due 1-1-50, with interest coupons due 1-1-41 and subsequent attached @ 121			6,050.00
	Not disposed of during year @ 125¼		6,262.50	
	Accrued interest from 7-1-40		100.92	100.92

Item No.	Description.	Subsequent valuation date	Value under option	Value at date of death
49.	10 $1,000.00 4% Permanent Improvement Bonds of the City of Minneapolis, due 11-1-52, with interest coupons due 5-1-41 and subsequent attached @ 122½			12,250.00
	Not disposed of during year @ 113		11,300.00	
	Accrued interest from 11-1-40		53.33	53.33
50.	10 $1,000 4½% Serial Gold Bonds of City and County of San Francisco Boulevard Bond Issue, due 11-1-51, with interest coupons due 5-1-41 and subsequent attached @ 127½			12,750.00
	Not disposed of during year @ 117¾		11,775.00	
	Accrued interest from 11-1-40		60.00	60.00
	Estate of Sidney M. Spiegel, deceased			
72	Schedule B (Con'd.)			
51.	35 $1,000 5% First and Refunding Mortgage Gold Bonds of Illinois Power and Light Corporation, due 11-1-56, with interest coupons due 6-1-41 and subsequent attached @ 106½			37,187.50
	Not disposed of during year @ 104¼		36,443.75	
	Accrued interest from 12-1-40		87.50	87.50

52.	1 $1,100 2% Debenture of Lake Shore Country Club, due 1-2-54, with interest coupon due 1-2-41 and subsequent attached @ 40			440.00
	Sold during year following death:	7-24-41	521.95	
	Accrued interest from 7-2-40		10.39	10.39
53.	5 $1,000 4% First Mortgage Bonds of The Southern Indiana Railway Company, due 2-1-51, with interest coupons due 2-1-41 and subsequent attached @ 47			2,350.00
	Not disposed of during year @ 53		2,650.00	
	Accrued interest from 8-1-40		77.77	77.77
54.	1 $1,000 6% First Mortgage Bond of Tokyo Dento Kabushiki-Kaisha, due 6-15-53, with coupons due 6-15-41 and subsequent attached @ 46			460.00
	Sold during year following death:	7-24-41	396.99	
	Accrued interest from 12-15-40		.67	.67
	Total (also enter under the Recapitulation, Schedule O)		$905,642.68	$1,005,995.33

73 Schedule C.

Mortgages, Notes and Cash.

Did the decedent, at the time of his death, own any mortgages, notes or cash? (Answer "Yes" or "No".) Yes

Item	Description	Subsequent valuation date	Value under option	Value to date of death
1.	Cash on deposit in checking account with Continental Illinois National Bank and Trust Company of Chicago	12-19-41	$53,575.42	$53,575.42
2.	Cash on hand held for deposit at date of decedent's death	12-19-41	2,666.52	2,666.52
3.	Cash on deposit in checking account with American National Bank and Trust Company of Chicago	12-19-41	1,464.27	1,464.27
4.	Petty cash fund held in office of decedent	12-19-41	11.89	11.89
5.	A 13-1/3% interest in the following investments, which are being administered by Joseph R. Pick, as agent:			
(a)	First Mortgage note of Domenico A. Roti on premises at 2601-03 Devon Avenue, Chicago, Illinois; originally due May 1, 1935, subject to forbearance agreement extending to October 1, 1941, with interest at 3% per annum $26,000.00			

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
(b)	First Mortgage notes of J. Milton Richardson on premises at 6406-08 Drexel Avenue, Chicago, Illinois, originally due 2-14-35, in the amount of $16,500, subject to forbearance agreement extending to 2-11-43, with interest at 5½% per annum			13,000.00

Estate of Sidney M. Spiegel, Deceased.

74 Schedule C (Continued)

(c)	Certificate No. 15 of Chicago Title and Trust Company, as Trustee under Trust No. 31953, known as Logan Court Apartments Liquidation Trust dated May 8, 1940, for 3,000 beneficial units therein, at "book cost"			$3,000.00
(d)	Cash ($1,975.68 less a real estate tax reserve of $861.69)			1,113.99
	Total Agency assets at "book cost" as at December 27, 1940 (at par, and exclusive of accrued interest)			43,113.99

Item	Description	Subsequent Valuation Date	Value Under Option	Value at Date of Death
	13⅓% thereof, representing decedent's interest 5,748.53			
	At ½ of cost	12-19-41	$2,874.27	$2,874.27
6.	$200.00 Promissory Note dated December 16, 1933, payable ninety days after date, without interest, signed by Julius P. Weiner	12-19-41	No Value	No Value
7.	$1,000 Note, signed by B. M. Rosenheim, dated April 3, 1936, payable without interest "sometime after date"	12-19-41	No Value	No Value
8.	$11,613.15 promissory note due from Edwin P. Goldsmith. Said note was originally due April 4, 1933, dated April 4, 1932, interest 5%	12-19-41	No Value	No Value
	Estate of Sidney M. Spiegel, deceased			
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9.	$7207.50 due from Carl Neuberger upon three promissory notes dated 12-10-30, 2-7-31 and 5-20-31, each bearing interest at 6% per annum	12-19-41	No Value	No Value
10.	$22.15 due from Sulka & Company, merchants, Chicago. This represents merchandise credit due to decedent at date of death	12-19-41	$22.15	$22.15

11. $310.00 book account due from Chicago Committee for Jewish Refugees, 130 North Wells St., Chicago, Ill. Correspondence in decedent's files indicates the existence of an arrangement whereby the amount of the advance was to be repaid by one Dr. Bissler before December, 1942	12-19-41	No Value	No Value
TOTAL (also enter under the Recapitulation, Schedule O)		$60,614.52	$60,614.52

Estate of Sidney M. Spiegel, Deceased

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Schedule D

Insurance

(See Instructions on reverse of this sheet)

(1) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No.") No.

(2) Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "Yes" or "No.") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	None			None
TOTAL			$	$
Less amount receivable by beneficiaries, other than the estate, not in excess of $40,000			$	$
TOTAL Included (also enter under the Recapitulation, Schedule O)			$	$

(If more space is needed, insert additional sheets of same size.)

Estate of Sidney M. Spiegel, deceased. Sheet VII

77 Instructions For Schedule D

Insurance

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system.

Life insurance not includible in the gross estate under the provisions of subsection (g) of section 811 of the Internal Revenue Code and the estate tax regulations pertaining thereto may, depending upon the facts of the particular case, be includible under some other subsection of section 811 and the applicable regulations, such as subsection (c) in the case of insurance "taken out" by the decedent on or prior to the date of Treasury Decision 5032 and also transferred by him on or prior to such date in contemplation of death.

Insurance in Favor of the Estate

The full amount of the proceeds of insurance on the life of the decedent receivable by the executor or administrator, or otherwise payable to or for the benefit of the estate, should be included in the gross estate. Insurance in favor of the estate includes insurance effected to provide funds to meet the estate tax, and any other taxes, debts, or charges which are enforceable against the estate. The manner in which the policy is drawn is immaterial so long as there is an obligation, legally binding upon the debts, or charges. The full amount is so includible even though the premiums or other consideration wherewith the insurance was acquired may have been paid by a person other than the decedent. The special insurance exemption of $40,000 is not applicable against the proceeds of insurance in favor of the estate.

Insurance Receivable by Beneficiaries Other Than the Estate

Insurance taken out by the decedent on his own life and receivable by beneficiaries other than the estate is includible in the gross estate as hereinafter set forth.

Insurance receivable by beneficiaries other than the estate is considered to have been "taken out" by decedent

where he paid, either directly or indirectly, all the premiums or other consideration wherewith the insurance was acquired, whether or not he made the application. Such insurance is not considered to have been so "taken out," even though the application was made by the decedent, if no part of the premiums or other consideration was paid either directly or indirectly by him. Where a portion of the premiums or other consideration was actually paid by another and the remaining portion by the decedent, either directly or indirectly, such insurance is considered to have been "taken out" by the latter in the proportion that the payments therefor made by him bear to the total amount paid for the insurance.

Legal incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possessed a legal incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.

Decedent dying on or before January 10, 1941.—In case the decedent died on or before January 10, 1941, the date of Treasury Decision 5032, the amount in excess of $40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate to the extent to which such insurance was taken out (purchased or premiums paid) by the decedent and with respect to which the decedent possessed any of the legal incidents of ownership at the time of his death.

Decedent dying after January 10, 1941.—In case the decedent died after January 10, 1941, the date of Treasury Decision 5032, the amount in excess of $40,000 of the aggregate proceeds of all insurance on the decedent's life not receivable by or for the benefit of his estate must be included in his gross estate as follows:

(1) To the extent to which such insurance was "taken out" (purchased or premiums paid) by the decedent on or before January 10, 1941, and with respect to which the decedent possessed any of the legal incidents of ownership at any time after such date; and

(2) To the extent to which such insurance was "taken out" (purchased or premiums paid) by the decedent after January 10, 1947, regardless of whether he possessed any of the legal incidents of ownership therein at any time.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For instance, if the decedent left life insurance otherwise includible in the gross estate and payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed in the schedule and therefrom subtracted the $40,000 exemption in the space provided thereon. The word "beneficiaries," as used in reference to this $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Example: Insurance on the life of the decedent who died after January 10, 1941, the date of Treasury Decision 5032, totaled $200,000. It was payable to his son as beneficiary and the decedent never possessed any of the legal incidents of ownership therein. Premiums aggregating $100,000 were paid for the insurance, of which the decedent paid $50,000 before the date of Treasury Decision 5032 and $30,000 after that date. The remaining premiums of $20,000 were paid by the son. The extent to which the insurance was "taken out" by the decedent after the date of the Treasury decision is the proportion of $200,000 that the amount of the premiums paid by him after such date, $30,000, bears to the total amount of the premiums paid for the insurance, $100,000. Such proportion is three-tenths of $200,000, or $60,000. As the decedent possessed none of the legal incidents of ownership in the insurance at any time after the date of the Treasury decision, $100,000 of the insurance, the extent to which it was "taken out" by the decedent before such date $\left(\frac{50,000}{100,000} \times \$200,000\right)$, is excluded from the gross estate. The amount of $40,000, the extent to which the insurance was not "taken out" by the decedent $\left(\frac{20,000}{100,000} \times \$200,000\right)$, is also excluded from the gross estate. The amount of the insurance "taken out" by the decedent after the date of the Treasury decision, $60,000, is reduced by $40,000, the special insurance exemption, and the amount of the insurance included in the gross estate is $20,000.

Execution of Schedule.

Insurance payable to the estate should be listed first and the full amount entered in the fourth or fifth column. Immediately following should be disclosed under the second column headed "Description," all insurance payable to beneficiaries other than the estate whether or not the executor believes the insurance is includible before deduction of the special insurance exemption of $40,000. If the executor determines that the full amount of the proceeds of any policy payable to beneficiaries other than the estate is includible, before deduction of the insurance exemption, the full amount should also be entered in the fourth or fifth column. If the executor determines with respect to any policy that the entire proceeds are not so includible in accordance with instructions above, and enters no amount or an amount less than the full proceeds, a complete explanation of his determination, including a computation of the amount included, if any, should be submitted either on the schedule or in a separate statement attached. A photostatic copy of any such policy should also be filed with the return.

Deduction may be taken in the space provided near the bottom of the schedule equal to the amount of the proceeds of insurance receivable by beneficiaries other than the estate and included in the fourth or fifth column, but not exceeding $40,000. In describing a policy, state name of company, number of policy, and name of beneficiary.

The "Life Insurance Statement," Form 712, for each policy listed in the schedule should be obtained from the insurance company by the executor and filed with the return.

Estate of Nonresident Alien.

In the case of an estate of a nonresident alien of the United States, the proceeds of insurance on his life need not be included.

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Schedule E

Jointly Owned Property

(See Instructions on reverse of this sheet)

(1) Did the decedent, at the time of his death, own any property as a joint tenant or as a tenant by the entirety, with right of survivorship? (Answer "Yes" or "No.") No.

(2) If so, state the name and address of each surviving cotenant.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	None		$	$ None
Total (also enter under the Recapitulation, Schedule O)			$	$

(If more space is needed, insert additional sheets of same size)

Estate of Sidney M. Spiegel, deceased Sheet VIII

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Instructions for Schedule E

Jointly Owned Property

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenant by the entirety, with right of survivorship, must be disclosed under this schedule.

The full value of the property must be included in the gross estate, unless it can be shown that a part of the property originally belonged to the other tenant or tenants and was never received or acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth. Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for less than an adequate and full considera-

tion in money or money's worth, there should be omitted only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants. For the purposes of the estate tax, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of the value of the property should be included. Where the property was acquired by the decedent and another person or persons by gift, bequest, devise, or inheritance as joint tenants, and their interests are not otherwise specified or fixed by law, then there should be included only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the entire property is includible in the gross estate for purposes of the tax, the burden is upon him to show his right to include such lesser value, and in such case he should make proof of the extent, origin, and nature of the decedent's interest of the decedent's cotenant or cotenants.

In every instance a statement under the column headed "Description" must disclose whether the whole or only a part of the property is included in the gross estate. If only a part of the property is included in the gross estate, the fair market value of the whole must be shown under "Description."

Property in which the decedent held an interest as a tenant in common should not be listed under this schedule, but the value of his interest therein should be returned under Schedule A, if real estate, or if personal property, under such other appropriate schedule. The decedent's interest in a partnership should not be included under this schedule, but should be shown under Schedule F, "Other miscellaneous property."

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Schedule F

Other Miscellaneous Property

(See Instructions on reverse of this sheet)

(1) Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No.") No.

(2) Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No.") Yes.

Item No.	Description		Subsequent Valuation date	Value under option	Value at date of death
				$	$
1.	Certificate of Indebtedness of $2,500.00 of The Standard Club				
2.	4 Platinum Vest Button Set, diamonds and emeralds	$150.00			No Value
	1 Pr. Gold Star Sapphire Link Buttons	50.00			
	1 Pr. Emerald and Diamond Links	200.00			
	2 Studs to match above	75.00			
	1 Gentleman's Diamond and Sapphire Ring	75.00			
	1 Pr. Small Pearl Studs	50.00			
	1 Fresh Water Pearl Scarf Pin	25.00			
	1 Vest Chain with 5 Pearls	25.00			
	1 Vest Chain with 7 Pearls, Small	15.00			
	1 Men's Waltham Pocket Watch	65.00			
	1 Gold Knife	5.00			
	1 Gold Locket	15.00			
	2 Gold Pencils	10.00			
	6 Gold Scarf Pins	100.00	$860.00		$860.00
Total (also enter under the Recapitulation, Schedule O)				$	$

(If more space is needed, insert additional sheets of same size)

Estate of Sidney M. Spiegel, deceased Sheet IX

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Instructions for Schedule F.

Other Miscellaneous Property.

Under this schedule list all items of the gross estate not returnable under any other schedule, such as the following: Debts due the decedent; interests in business; claims; rights; royalties; pensions; leaseholds; judgments; shares in trust funds; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock; farm machinery; automobiles; etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statements of assets and liabilities as of the valuation date and for the 5 years preceding, and statements of the net earnings for the same 5 years. Good will must be accounted for. In general, the same information should be furnished and the same methods followed as in valuing close corporations.

In case of an interest in a trust fund duplicate copies of the trust instrument should be submitted.

In describing an annuity, the name and address of the grantor of the annuity should be given, or if payable out of a trust or other fund, such a description as will fully identify it. If payable for a term of years, the duration of the term and the date on which it began should be given, and if payable for the life a person other than the decedent, the date of birth of such person should be stated.

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Schedule F (Continued).

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
3.	Office Furniture, as follows:			
	1 Large Steel Safe Cabinet,			
	1 4-Drawer Steel Filing Cabinet			
	1 "Carrier" Air Conditioning Unit			
	1 Walnut Executive's Desk and Leather Swivel Chair			

1 Leather Sofa 2 Upholstered Leather Visitor's Chairs 2 Wood Visitor's Chairs Leather Backing 1 Walnut Telephone Table 2 Wood Wastebaskets 2 Metal Smoke Stands 1 Brass Cuspidor 1 Double Pen Parker Desk Set 1 Walnut Secretary's Desk and Swivel Chair 1 Underwood Typewriter #2504300-5 Total value of above furniture	$ 225.00	$ 225.00
Total (also enter under Recapitulation, Schedule O)	$1,085.00	$1,085.00

Estate of Sidney M. Spiegel, deceased.

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Schedule G.

Transfers During Decedent's Life.

(See instructions on reverse of this sheet.)

(1) Did the decedent make any transfer described in the first paragraph (including the six subparagraphs) of the instructions on the reverse of this sheet? (Answer "Yes" or "No.") No.

(2) Did the decedent, within 2 years immediately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(3) Did the decedent, at any time, make a transfer of an amount of $5,000 or more without an adequate and full consideration in money or money's worth, but not believed to be includible in the gross estate as indicated in the first paragraph (including the six subparagraphs) of the instructions for this schedule? (Answer "Yes" or "No.") Yes.

(4) If the answer to question (3) is "Yes" state date, amount or value, character of transfer, and motive which actuated the decedent in making the transfer.

See statement below.

(5) Were there in existence at the time of the decedent's death any trusts created during his lifetime? (Answer "Yes" or "No.") Yes.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	On Jan. 2, 1920 the decedent created a trust for the benefit of his three children, share and share alike, to which trust he transferred certain stocks described in the declaration of trust, a copy of which is attached hereto. On December 26, 1934 the decedent assigned all of his right, title and interest in and to all of his insurance to his children, effective as follows:		$	$
	To Sidney M. Spiegel, Jr.—			
	Name of Company — Policy No.			
	The Northwestern Mutual Life Ins. Co. — 524051			
	Do — 339031			
	Do — 573414			
	Do — 573415			
	Do — 922326			
	Do — 435045			
	Do — 435046			
	Total (also enter under Recapitulation, Schedule O)		$	$

(If more space is needed, insert additional sheets of same size.)

Estate of Sidney M. Spiegel, deceased.

Sheet X

84 Instructions for Schedule G.

Transfers During Decedent's Life.

In accordance with the provisions of subsections (c) and (d) of section 811 of the Internal Revenue Code, the following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax, and must be included in the gross estate under this schedule.

(1) Transfers made after September 8, 1916, in contemplation of death.

(2) Transfers intended to take effect in possession or enjoyment at or after the decedent's death, or transfers contingent upon the decedent's death, i. e., where the decedent's death is a necessary condition to effect an indefeasible transfer of the property from him or his estate. For certain exceptions with respect to such transfers, see the Estate Tax Regulations.

(3) Transfers made after 10:30 p. m., eastern standard time, March 3, 1931, whereby the decedent retained the use, possession, right to the income, or other enjoyment of the transferred property for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or, except with respect to transfers made before 5 p. m., eastern standard time, June 6, 1932, for any period not ascertainable without reference to his death.

(4) Transfers (not otherwise includible) whereby the decedent retained the right to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof, as follows:

(a) In case the transfer was made after 10:30 p. m., eastern standard time, March 3, 1931, and the right to so designate was retained by the decedent alone, for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or

(b) In case the transfer was made after 5 p. m., eastern standard time, June 6, 1932, and the right to so designate was retained by the decedent alone or in conjunction with

any other person or persons, for decedent's life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for any period not ascertainable without reference to his death.

(5) Transfers whereby the enjoyment of the transferred property was subject at decedent's death to any change through the exercise of a power to alter, amend, revoke, or terminate, as follows:

(a) In case the transfer was made before 4:01 p. m., eastern standard time, June 2, 1924, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person having no substantial adverse interest in the transferred property.

(b) In case the transfer was made after 4:01 p. m., eastern standard time, June 2, 1924, and before June 23, 1936, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with any person (regardless of whether such person had a substantial adverse interest in the transferred property), or

(c) In case the transfer was made after June 22, 1936, regardless of whether the power was reserved at the time of the transfer or later created or conferred, and without regard to the source from which the power was acquired, regardless of whether the power was exercisable by the decedent alone or in conjunction with any person, and if in conjunction with any person, regardless of whether such person had a substantial adverse interest in the transferred property.

(6) Transfers effected after September 8, 1916, by the relinquishment in contemplation of death of his power to alter, amend, revoke, or terminate a transfer of property previously made by the decedent under conditions set forth in the preceding subparagraph (5).

For more detailed information, see the Estate Tax Regulations.

Transfers included in the gross estate should be valued as of the date of the decedent's death or, if the optional valuation is adopted, in accordance with subsection 811(j) of the Internal Revenue Code. If only a portion of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the value of the gross

estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at the valuation date, due to such additions or betterments, should not be included. However, where only a portion of the value of the property is included, the value of the whole must be disclosed under the column headed "Description," together with an explanation of the proportionate inclusion.

To constitute a bona fide sale for an adequate and full consideration in money or money's worth, it must have been made in good faith, and the price must have been an adequate and full equivalent and reducible to a money value. If the price was less than an adequate and full equivalent, only the excess of the fair market value of the property, as of the valuation date, over the price received by the decedent should be included in the gross estate. For the purpose of the estate tax the relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

All transfers made by the decedent during his life of an amount of $5,000 or more except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a statement of the pertinent facts should be made.

In case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof must be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a non-resident, only one copy need to be filed, certified or verified, as the case may be.

The name of the transferee, date and form of transfer, and a complete description of the property should be set forth in this schedule. Rents and other income must be included as explained under "Execution of Return" in the general instructions.

Nonresident alien. If the decedent was a nonresident alien the transfer must be included if the property was situated in the United States, either at the date of the decedent's death or at the date of the transfer.

85 Schedule G (Continued).

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	To Sidney M. Spiegel, Jr. (Contd.)			
	Name of Company — Policy No.			
	Northwestern Mutual Life Ins. Co., of Milwaukee, Wisc. — 573416			
	Do — 573417			
	Do — 573418			
	To Katherine J. Spiegel—			
	Name of Company — Policy No.			
	The Northwestern Mutual Life Ins. Co. — 922322			
	Do — 922323			
	Do — 922324			
	Do — 922325			
	The Mutual Benefit Life Ins. Co. of Newark, N. J. — 596152			
	Do — 597691			
	To Julia K. Michels—			
	Name of Company — Policy No.			
	The Mutual Benefit Life Ins. Co. of Newark, N. J. — 596153			
	Do — 596154			
	Do — 597692			
	Do — 597693			
	Massachusetts Mutual Life Ins. Co. — 296958			
	Do — 296959			
	Do — 296960			
	Estate of Sidney M. Spiegel, deceased.			

86. Know All Men By These Presents, that I, Sidney M. Spiegel, of the City of Chicago, County of Cook and State of Illinois, in consideration of One Dollar ($1.00) and other good and valuable considerations, have sold, transferred, assigned, set over and delivered, and by these presents do sell, transfer, assign, set over and deliver to Modie J. Spiegel and Sidney M. Spiegel, and the survivor of them, as Trustees, six hundred twenty-five (625) shares of the capital stock of Spiegel's House Furnishing Company and seven hundred fifty (750) shares of the capital stock of Spiegel May Stern Company, In Trust, nevertheless, for the following uses and purposes, and upon the following terms and conditions:—

1: The said Trustees, and the survivor of them, or any successor trustee, shall have full, absolute and complete power to hold, manage and control said shares and every part thereof; to sell, exchange, transfer or otherwise dispose of the same, or any part thereof, and to invest and reinvest the proceeds derived from any such sale or sales, or other disposition of said shares, or any part thereof, during the continuance of this trust. While said shares of stock, or any substitutes therefor, are held by said Trustees, or the survivor of them, or any successor Trustee, if any corporation whose stock or other securities are held by said Trustees should require any action of any kind to be taken, said Trustees, and the survivor and any successor trustee, shall have the same right to take any action which may be required of any stockholder or holder of any securities of any such corporation as if said Trustees, and the survivor and any successor held such shares or said securities in their own individual names and were the sole owners thereof.

2: The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katharine J. Spiegel, Sidney M. Spiegel, Jr. and Julia K. Spiegel, such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such

deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

3: Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children
87 him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

4: If during the continuance of this trust there shall be any increase in the principal of said trust estate by reason of the declaration of any stock dividends or other increases or emoluments all such increases shall be and remain a part of said trust estate and shall be held by said Trustees upon the same terms and conditions as are herein set forth.

5: In the event of the death, refusal, inability, or failure for any reason to act of both said Trustees at any time during the continuance of this trust, then The Chicago Title & Trust Company shall become the successor Trustee, with the same rights, powers, duties and obligations as are herein vested in and imposed upon the Trustees, and the survivor thereof, hereinbefore named.

6: None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

In Witness Whereof I have hereunto set my hand and seal, at Chicago, Illinois, as of the 2nd day of January, 1920.

Sidney M. Spiegel. (Seal)

We hereby accept the above-named shares of stock and agree to hold the same subject to the terms above-mentioned, as of the 2nd day of January, 1920.

Modie J. Spiegel. (Seal)
Sidney M. Spiegel. (Seal)

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Schedule H

Powers of Appointment

(See instructions on reverse of this sheet)

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	None			None
	Total (also enter under the Recapitulation, Schedule O)		$	$

(If more space is needed, insert additional sheets of same size.)

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Instructions for Schedule H.

Powers of Appointment.

In accordance with subsection (f) of section 811 of the Internal Revenue Code, property passing under a general power of appointment must be included in the gross estate under this schedule if exercised by the decedent (A) by will, or (B) by deed resulting in any of the transfers described in subparagraphs (1), (2), (3), and (4) of the first paragraph of the instructions for Schedule G; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

If the power is exercised for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there should be included in the gross estate only the excess

of the fair market value, at the applicable valuation date, of the property passing under the power over the value of the consideration received by the decedent.

Only property passing under a general power should be included. A general power is one to appoint to any person or persons in the discretion of the donee (or appointor) of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, if it is exercisable in favor of the donee, his estate, or his creditors.

Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with the return, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required. The copies must be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned for tax.

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Schedule I.

Property Previously Taxed.

(See instructions on reverse of this sheet.)

Name of donor or prior decedent .....
If a decedent, show date of death .....
If a donor, show date of gift ..... Residence of donor at time of gift, or of prior decedent at time of death .....

Item No.

Description of property, subsequent valuation dates, and description and amounts of mortgages or other liens paid
(Column A) Value under option.
(Column B) Income under option
(Column C) Value at date of death.
(Column D) Income accrued at date of death.
(Column E) Finally determined value in prior estate or gift.

None.

Totals $..... $..... $..... $..... $.....

Total included in gross estate (total of columns A and B, or total of columns C and D, whichever is applicable) (also enter under Recapitulation, Schedule O) $.....

(a) Gross deduction (total of applicable column A or C, or total of column E, whichever is lower) $.....

(b) Total amount paid on mortgages or other liens deducted in prior estate or gift (enter detailed information at bottom of column headed "Description.") $.....

(c) Deduction for property previously taxed without proportionate reduction (item (a) minus item (b)) (also enter under Schedules P and Q, or Schedule R.) $.....

(If more space is needed, insert additional sheets of same size.)

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Instructions for Schedule I.

Property Previously Taxed.

Property includible in the gross estate that was received from a person who died within 5 years prior to the decedent's death or received by gift within 5 years prior to the decedent's death, or acquired in exchange thereof, with respect to which a deduction is authorized because an estate tax was paid by the prior estate or a gift tax was paid by the donor, should be returned in this schedule. The deduction for such property is authorized under the provisions of section 812 (c) or section 861 (a) (2) of the Internal Revenue Code, in accordance with the following conditions and limitations:

(a) Conditions:

(1) The property must have been received by the decedent by gift, bequest, devise, or inheritance from a prior decedent who died within 5 years of the decedent's death, or received by him as a gift within 5 years of his death.

(2) The property must be identified either as the same which the decedent so received or as property acquired in exchange therefor.

(3) The property so received must have formed a part of the gross estate situated in the United States of such prior decedent, or have been included in the total amount of gifts of the donor.

(4) An estate tax by or on behalf of the estate of such prior decedent, or a gift tax by or on behalf of the donor, must have actually been paid (the mere filing of a return for such estate or donor not being sufficient).

(5) No such deduction, in respect to the property or property exchanged therefor, must have been allowable in determining the value of the net estate of the prior decedent.

(b) Limitations:

(1) The deduction is limited to the aggregate value of the property as finally determined in the case of the prior decedent or donor, or to the aggregate value of such property included in the value of the gross estate of the present decedent, whichever is lower.

(2) The deduction, as limited in (1), is reduced by the total amount paid prior to the decedent's death on any

mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in determining the estate tax of the prior decedent or the gift tax of the donor.

(3) The deduction is further reduced by the proportion of the total other deductions (allowable under Schedules J, K, L, M, and N, and the specific exemption if applicable) which the amount otherwise deductible for property previously taxed bears to the amount of the gross estate.

The value of each item of property and any income thereon determined as of the applicable date or dates for inclusion in the value of the gross estate of the present decedent should be entered under the appropriate columns A, B, C, and D. It will be noted that column A is provided for the value under the option of the principal of each item of property and column B for any income thereon under the option, and that column C is provided for the value at the date of the decedent's death of the principal of each item of property, and column D is provided for any income thereon accrued to the date of death. The value finally determined in the prior estate or gift of each item of property should be entered in column E.

The description should show the schedule and item number of the property as it appeared in the prior return. To make it clear that the schedule and item number relate to the prior return, they should be included in parentheses. If only a portion of an item in the prior estate is reflected in the present estate, that fact should be indicated and only a proportionate part of the value of the item in the prior estate, as finally determined, should be entered in column E.

In accordance with the foregoing second limitation, any amount paid before the death of the present decedent in discharge of a mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in the prior case, should be shown last under the column headed "Description," together with an identification of the item of property involved and the item deducted in the prior case. The total of such amounts paid should be entered at item (b).

It will be noted that the "Total included in gross estate" (included in the value of the gross estate utilized for the computation of the tax) is the total of columns A and B if the optional valuation is adopted, or the total of columns C and D if the optional valuation is not adopted.

However, if the optional valuation is adopted, both such totals should be entered under the appropriate columns under the Recapitulation, Schedule O.

The amount of the gross deduction for property previously taxed, in accordance with the first limitation, is entered at item (a). If the optional valuation is adopted, the amount of the gross deduction is the total of column A or the total of column E, whichever is the lower. If the optional valuation is not adopted, the amount of the gross deduction is the total of column C or the total of column E, whichever is the lower. The amount of item (b) is subtracted from the amount of item (a); and the difference, which is entered at item (c), is the amount of the deduction as reduced in accordance with the second limitation. The amount of the net deduction for property previously taxed, as reduced by a certain proportion of the total other deductions in accordance with the third limitation, is finally computed under Schedules P and Q or under Schedule R.

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Deductions.

Schedule J.

Funeral and Administration expenses

(See instructions on reverse of this sheet)

Item No.	Funeral Expenses	Amount
1.	Room, board and sundry expenses of last illness— The Standard Club	$ 208.62
2.	Medical services, last illness— Herbert F. Binswanger, M. D.	115.00
3.	Elastic purchased for decedent— Riddle & Michaelis	1.50
4.	To reimburse Miss Spiegel for drug bills, nurses' fees and other expenses of decedent—Katherine J. Spiegel	299.58
5.	Condolence acknowledgments— Secretaries, Inc.	98.49
6.	Organist services at funeral— Ralph Morse Gerber	15.00
7.	Funeral services—Furth & Co.	624.60
Total (also enter under the Recapitulation, Schedule O)		$1362.79

Amount of executors' commissions (also enter under the Recapitulation, Schedule O) None.
Estimated /agreed upon/ paid. (Strike out words not applicable.)

Amount of attorneys' fees (also enter under the Recapitulation, Schedule O) Pd. 1941 $6000.00
Estimated /agreed upon/ paid. (Strike out words not applicable.)

Item No.	Miscellaneous administration expenses	Amount
8.	F. O. A. B. tax for quarter ended 3/31/41—Collector of Internal Revenue	$ 10.00
9.	For reimbursement of court costs and miscellaneous cash expenses—Mayer, Meyer, Austrian & Platt	146.75
10.	Additional court costs—Mayer, Meyer, Austrian & Platt	26.51
11.	Estimated Administration expenses	250.00
12.	Altschuler Melvion & Glasser, for accounting services	3500.00
	Total (also enter under the Recapitulation, Schedule O)	$3933.26

(If more space is needed, insert additional sheets of same size.)

Estate of Sidney M. Spiegel, deceased.

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Instructions for Schedule J.

Funeral and Administration Expenses.

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. An item may be entered for deduction though the exact amount is not known at the time, provided it is ascertainable with reasonable certainty, and will be paid. No deduction may be taken upon the basis of a vague or uncertain estimate. Preserve all vouchers and receipts for inspection by an Internal Revenue agent.

The executor or administrator, when filing the return, may deduct his commissions in such an amount as has actually been paid or which at that time it is reasonably expected will be paid, but no deduction may be taken if no commissions are to be collected. In the case the amount of the commissions has not been fixed by decree of the proper court, the deduction will be allowed on the final audit of the return provided: (1) That the Commissioner is reasonably satisfied that the commissions claimed will be paid; (2) that the amount entered as a deduction is within the amount allowable by the laws of the jurisdiction wherein the estate is being administered; and (3) that it is in accordance with the usually accepted practice in said jurisdiction in estates of similar size and character. If the commissions claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor stating that such amount has been agreed upon and will be paid.

A bequest or devise to the executor in lieu of commissions is not deductible. If, however, the decedent fixed by his will the compensation payable to the executor for services to be rendered in the administration of the estate, deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice.

Amounts paid as trustees' commissions do not constitute expenses of administration and are not deductible, whether received by the executor acting in the capacity of a trustee or by a separate trustee as such.

When filing the return there may be deducted such an amount of attorney's fees as has actually been paid or

which at that time it is reasonably expected will be paid. If on the final audit of the return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the fees claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor or the attorney stating that such amount has been agreed upon and will be paid.

Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charged against the beneficiaries personally and are not administration expenses as contemplated by the statute.

Executors and attorneys should note that executors' commissions and attorneys' fees constitute taxable income and that the amounts received or receivable by them as such compensation are cross-referenced for income-tax purposes.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Deduction for property taxes is limited to such taxes so accrued prior to the decedent's death. Credit to a limited extent may, under "Computation of Tax", sheet XX be claimed for estate, legacy, succession, inheritance, and gift taxes.

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Schedule K

Debts of Decedent

(See Instructions on reverse of this sheet)

Date No.	Creditor and nature of claim	Amount
1.	F.O.A.B. tax, quarter ended 12 31 40—Collector of Internal Revenue	$ 12.00
2.	Office salary—Florence Nierman	594.00
3.	Interest on additional 1938 assessment—Collector of Internal Revenue	6.18
4.	Insurance on Ashland Avenue property—Haskell, Miller, Grossman & Co.	30.24
5.	Telephone expense—Illinois Bell Telephone Co.	20.92
6.	First quarterly installment, 1940 Federal income tax of decedent—Collector of Internal Revenue	323.71
7.	1940 Personal property taxes of decedent—John Toman, County Collector	7.34
8.	1940 Personal property taxes of decedent—Sanborn Hale, Town Collector	162.79
9.	First installment, 1940 real estate taxes, Ashland Avenue property—John Toman, County Collector	115.53
10.	First installment, 1940 real estate taxes, Ashland Avenue property—John Toman, County Collector	154.75
11.	Second quarterly installment, 1940 Federal income taxes of decedent—Collector of Internal Revenue	323.71
12.	Additional Federal income tax assessment and interest, year 1940—Collector of Internal Revenue	2,276.98
13.	To reimburse Mr. Spiegal, Jr. for payment by him of additional 1938 income tax assessment against decedent Sidney M. Spiegal, Jr.	57.49
14.	Third and fourth quarterly installments, 1940 income taxes of decedent	647.42
15.	Second installment 1940 Real Estate Taxes upon Ashland Avenue property	270.28
	Total (also enter under the Recapitulation, Schedule O)	$5,003.34

(If more space is needed, insert addition sheets of same size)

Estate of Sidney M. Spiegal, deceased.

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Instructions for Schedule K.

Debts of Decedent.

Itemize under this schedule only valid debts of the decedent owed by him, at the time of death, except those secured by mortgage or other lien upon his property. Any indebtedness secured by a mortgage or other lien upon property of the gross estate should be entered under Schedule L. If the amount of the debt is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. If the claim is contested, that fact should be stated.

If the claim is founded upon a promise or agreement the deduction is limited to the extent that the liability was contracted bona fide for an adequate and full consideration in money or money's worth. A pledge or subscription evidenced by a promissory note or otherwise, even though enforcible against the estate, is deductible only to the extent that such pledge or subscription was made bona fide for an adequate and full consideration in cash or its equivalent.

The deduction for property taxes is limited to such taxes as accrued prior to the date of the decedent's death. Federal taxes on income received during decedent's lifetime are deductible, but taxes on income received after death are not deductible.

Enter in this schedule notes unsecured by mortgage or other lien and give full details, including name of payee, face and unpaid balance, date and term of note, interest rate and date to which interest was paid prior to death. Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: Edison Electric Illuminating Co., for electric service during December 1939, $25.

If the amount of the claim is the unpaid balance due on a contract for the purchase of any property of the gross estate, indicate the schedule and item number where such property is returned. If the claim represents a joint and several liability, the facts must be fully stated and the financial responsibility of the co-obligor explained.

All vouchers or original records should be preserved for inspection by an Internal Revenue agent.

96 Schedule L.

Mortgages and Liens.

(See instructions on reverse of this sheet)

Item No.	Description	Amount
	None	$
	Total (also enter under the Recapitulation, Schedule O)	$

(If more space is needed, insert additional sheets of same size)

Estate of Sidney M. Spiegal, deceased.

97 Instructions for Schedule L.

Mortgages and Liens.

Itemize under this schedule only obligations secured by mortgages or other liens upon property included in the gross estate. List under this schedule all notes and other obligations secured by the deposit of collateral, such as stocks, bonds, etc. Debts of the decedent unsecured by mortgage or other lien upon the property should be listed under Schedule K. Identify, by indicating under the column headed "Description", the particular schedule and item number where such property subject to the mortgage or lien is returned under the gross estate. The full value of the property, without any reduction for the mortgage or other indebtedness, must be returned as part of the gross estate. Real estate situated outside the United States does not form a part of the gross estate for the purpose of the tax, and no deduction may be taken of any mortgage thereon, or any indebtedness in respect thereto.

Show the name and address of the mortgagee, payee, or obligee, and the date and term of the mortgage, note, or other agreement under which the indebtedness is established. Show the face, amount, the unpaid balance, the rate of interest, and date to which the interest was paid prior to the decedent's death.

Mortgages upon, or any indebtedness with respect to, property included in the gross estate is deductible only to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth.

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Schedule M.

Net Losses and Support of Dependents

(See instructions on reverse of this sheet)

Item No.	Net losses during administration	Amount
	None	$ None
	Total (also enter under the Recapitulation, Schedule O)	$ None

Item No.	Support of dependents	Amount
	The Child's Award was allowed by the Probate Court of Cook County, Illinois, to Katherine J. Spiegel, daughter of the decedent, who resided with him at the time of his death	$25,000.00
	Total (also enter under the Recapitulation, Schedule O)	$25,000.00

(If more space is needed, insert additional sheets of same size.)

Estate of Sidney M. Spiegel, deceased.

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Instructions for Schedule M

Net Losses and Support of Dependents

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by Insurance or otherwise. Losses in order to be deductible must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. Such losses are not deductible if, at the time of the filing of the estate tax return, they had been claimed as a deduction for income tax purposes in an income tax return. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other compensation was received on account of loss, state the amount collected. The property with respect to which the loss is claimed should be identified by indicating the particular schedule and item number where such property is returned under the gross estate.

If the optional valuation is adopted, deduction for any loss is limited to the extent that such loss is not in effect allowed in the valuation of the item in the gross estate.

Support of dependents.—No deduction may be taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

100 **Schedule N**

Charitable, Public, and Similar Gifts and Bequests
(See Instructions on reverse of this sheet)

Item No.	Name and address of beneficiary	Character of institution	Amount
	None		$ None
Total (also enter under the Recapitulation, Schedule O)			$ None

(If more space is needed, insert additional sheets of same size)

Estate of Sidney M. Spiegel, deceased

101 **Instructions for Schedule N**

Charitable, Public, and Similar Gifts and Bequests

Instructions authorized for charitable, public, and similar gifts or bequests as set forth in the Estate Tax Regulations should be claimed under this schedule. If the transfer was made by will, duplicate copies, one certified, of the order admitting the will to probate, in addition to the copies of the will, should be submitted with the return. If the transfer was made by any other written instrument, duplicate copies thereof should be submitted with the return, and if the instrument is of record one copy should be certified and if not of record one copy should be verified. If the transfer was made by will, an affidavit of the executor must be submitted, showing whether the decendent's will has been, or to the best of his knowledge, information, and belief, will be contested. If claim is made for deduction of the value of the residue or of a portion thereof (e. g., present worth of a remainder interest in the residue), there should be submitted a copy of the computation whereby the value was determined.

If under the terms of the will or the law of the jurisdiction wherein the estate is administered or the law of the jurisdiction imposing the particular tax, the Federal estate tax or any estate, succession, legacy, or inheritance tax is payable in whole or in part out of any bequest, legacy, or devise deductible hereunder, the sum deductible is the amount of such bequest, legacy, or devise so reduced:

If the optional valuation is adopted, any bequest, legacy, devise, or transfer deductible under this schedule shall be valued for the purpose of the deduction as of the date of the decedent's death, with adjustment for any difference in the value of the property 1 year after his death, or at the date of its sale, or exchange within such year, except that no such adjustment may take into account any difference in value due to mere lapse of time or to the occurrence or nonoccurrence of a contingency.

For further instructions, see Estate Tax Regulations.

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Schedule O

Recapitulation

Schedule	Gross estate	Value under option	Value at date of death
A	Real estate	$ 15,000.00	$ 15,000.00
B	Stocks and bonds	905,642.68	1,005,995.33
C	Mortgages, notes, and cash	60,614.15	60,614.52
D	Insurance		
E	Jointly owned property		
F	Other miscellaneous property	1,085.00	1,085.00
G	Transfers during decedent's life		
H	Powers of appointment		
I	Property previously taxed		
	Total Gross Estate	$982,342.00	$1,082,694.85

Schedule	Deductions	Amount
J	Funeral expenses	$ 1,362.79
	Executors' commissions	
	Attorney's fees	6,000.00
	Miscellaneous administration expenses	3,933.26
K	Debts of decedent	5,003.34
L	Mortgages and liens	
M	Net losses during administration	
	Support of dependents	25,000.00
N	Charitable, public, and similar gifts and bequests	
	Total Deductions, except specific exemption and property previously taxed	$41,299.39

Schedule P

Net Estate for the Basic Tax—Resident or Citizen

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States.

1. Total gross estate		$982,342.20
2. Total deductions, except specific exemption and property previously taxed	$ 41,299.39	
3. Specific exemption	100,000.00	
4. Total deductions, except property previously taxed (item 2 plus item 3)	$141,299.39	
5. Deduction for property previously taxed without proportionate reduction (Schedule I, item c) $		
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1): $		
7. Net deduction for property previously taxed (item 5 minus item 6)	$	
8. Total deductions (item 4 plus item 7)		$141,299.39
9. Net estate (item 1 minus item 8)		$841,042.81

Estate of Sidney M. Spiegel, Deceased

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Schedule Q

Net Estate for the Additional Tax—Resident or Citizen

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States.

1. Total gross estate		$982,342.20
2. Total deductions, except specific exemption and property previously taxed	$41,299.39	
3. Specific exemption	$40,000.00	
4. Total deductions, except property previously taxed (item 2 plus item 3)	$81,299.39	
5. Deduction for property previously taxed without proportionate reduction (Schedule I, item c) $		
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1) $		
7. Net deduction for property previously taxed (item 5 minus item 6)	$	
8. Total deductions (item 4 plus item 7)		81,299.39
9. Net estate (item 1 minus item 8)		$901,042.81

Schedule R

Net Estate—Nonresident Alien

Instructions.—This schedule should be used only for the estate of a nonresident alien of the United States. No deductions are allowable hereunder unless the value of that part of the gross estate situated outside the United States is set forth.

1. Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I)	$	
2. Value of gross estate outside the United States (insert itemized schedule sheet showing value)		
3. Value of total gross estate wherever situated (item 1 plus item 2)	$	
4. Gross deductions under Schedules J, K, L, and M		
5. Net deductions under Schedules J, K, L, and M (that proportion of item 4 that item 1 bears to item 3)	$	
6. Charitable, public, and similar gifts and bequests, Schedule N		
7. No deductions, except property previously taxed (item 5 plus item 6)	$	
8. Deduction for property previously taxed without proportionate reduction (Schedule I; item e)	$	
9. Proportionate reduction (proportion of item 7 that item 8 bears to item 1)	$	
10. Net deduction for property previously taxed (item 8 minus item 9)		
11. Total deductions (item 7 plus item 10)	$	
12. Net estate (item 1 minus item 11)	$	

Estate of .....

Instructions for Computation of Tax.

For computation of tax, use the table set forth on the inside of the back cover.

Item 1. "Gross basic tax" is computed, by means of column 1 of the table, on the value of the net estate shown under Schedule P or Schedule R, as the case may be.

Item 2. "Credit for gift tax" is limited to such credit allowable under the statute against the gross basic tax. The gift tax must have been paid by or on behalf of the decedent in respect of property included in the gross estate. The credit cannot exceed the proportion of the gross basic tax, item 1, that the value of the included gift taxed bears to the entire gross estate, unless the gift tax was imposed by the Revenue Act of 1924, as amended, in which case the entire amount is allowable as a credit against the gross basic tax.

Item 4. "Credit for estate, inheritance, legacy, or succession tax" is allowed for such taxes paid as the result of the decedent's death to any State, Territory, or the District of Columbia (or, if the decedent died after June 29, 1939, to any possession of the United States), with respect to property included in the gross estate. This credit cannot exceed 80 per cent of item 3. The anticipated amount of the credit may be entered at item 4 and the Federal estate tax shown on the return computed in accordance therewith before such State, etc., taxes have been paid, but the credit cannot be finally allowed unless such taxes are actually paid and the credit therefor is claimed within 4 years after the return is filed (or within such further period as provided by the statute in the case of a petition filed with the United States Board of Tax Appeals or in the case of an extension or postponement of time for the payment of tax), and such credit is supported by the following evidence.

(1) Certificate of the proper officer of the taxing State, Territory, District of Columbia, or possession of the United States showing: (a) The total amount of tax imposed (before adding interest and penalties and before allowing discount); (b) the amount of discount allowed; (c) the amount of penalties and interest imposed or charged; (d) the total actually paid in cash; and (e) the date of payment.

(2) A certificate of the above-mentioned officer showing whether (a) a claim for refund of such taxes or any part thereof is pending and (b) whether a refund of such taxes or any part thereof has been authorized. If any refund

has been made, the date, the amount thereof, and a description of the property or interest in respect to which such refund was made must be shown in the certificate.

(3) Such additional proof as the Commissioner may specifically request.

If practicable the evidence described in (1) and (2), above, should be filed with the return, but if that is not convenient or possible it should be submitted as soon thereafter as practicable.

Item 6. "Total gross taxes (basic and additional) (Tentative Tax)" are computed on the value of the net estate shown under Schedule Q or Schedule R, as the case may be. If the decedent died before September 21, 1941, column 2 of the table should be used for this item. (See examples 1, 2, and 3 below.) If the decedent died after September 20, 1941, column 3 of the table should be used for this item. (See example 4 below.)

Item 9. "Credit for gift tax" is limited to such credit allowable under the statute against the gross additional tax. The gift tax may have been paid by or on behalf of the decedent in respect of property included in the gross estate. Such credit cannot exceed the proportion of the gross additional estate tax that the value of the included gift taxed bears to the entire gross estate, and furthermore cannot exceed the difference between the total amount of such gift tax and the gift tax credit therefor allowed against the gross basic tax. No credit, however, is allowable against the gross additional tax for gift tax imposed by the Revenue Act of 1924, as amended.

Item 12. "Defense tax" is applicable if the decedent died after the date of the enactment of the Revenue Act of 1940 (June 25, 1940), and on or before the enactment of the Revenue Act of 1941 (September 20, 1941). The amount of the defense tax is 10 per cent of the total net basic and additional taxes, item 11.

Item 13. "Total estate tax payable" is the sum of the net basic tax, the net additional tax, and (if applicable) the defense tax.

Example (1) (estate of decedent who died before September 21, 1941, subject to the basic tax, the additional tax and the defense tax, and involving credit for State inheritance and estate taxes): A resident of the United States died July 1, 1940, and the value of the net estate shown under Schedule P is $219,000. The tax shown in the first subcolumn of column 1 of the table on a net estate equaling

$200,000 is $4,500. As $210,000 exceeds $200,000 and falls below $400,000, the tax on the excess of $10,000 is computed at the rate of 4 per cent, the rate shown in the second subcolumn of column 1. The $400 tax on such excess added to $4,500 gives $4,900, the gross basic tax which should be entered at item 1. Credit for gift tax is not involved in this example, but it will be assumed that the maximum amount of credit for State estate, inheritance, legacy, or succession taxes is allowable; that is, 80 per cent, or $3,920, which should be entered at item 4. The difference, which is the net basic tax, is $980. The net estate shown under Schedule Q is $270,000. The amount of the total gross taxes (basic and additional—Tentative Tax) shown in the first subcolumn of column 2 on a net estate equalling $200,000, is $26,600. As $270,000 exceeds $200,000 and falls below $400,000, the amount of the total gross taxes on the excess of $70,000 is computed at 20 per cent, the rate shown in the second subcolumn of column 2. The $14,000, computed on such excess, added to $26,600, gives $40,600, the total gross taxes, and $40,600 should be entered at item 6. From the $40,600 is subtracted $4,900, the gross basic tax, and the difference, $35,700, is the gross additional tax which should be entered at item 8. As in this example no credit for gift tax is involved, the gross additional tax is the same as the net additional tax. The net basic tax, $980, item 5, added to the net additional tax, $35,700, item 10, results in a total of $36,680 which should be entered at item 11. Since the decedent died after the date of the enactment of the Revenue Act of 1940 (June 25, 1940) and before September 21, 1941, the defense tax imposed is 10 per cent of $36,680, or $3,668, which should be entered at item 12. The sum of $36,680 and $3,668 (item 11 plus item 12) is $40,348, the total estate tax payable, which should be entered at item 13. The computation of the tax in this example is set up below:

1.	Gross basic tax	$4,900
2.	Credit for gift tax	0
3.	Gross basic tax less credit for gift tax	$4,900
4.	Credit for estate, inheritance, legacy or succession tax	3,920
5.	Net basic tax	$980

6. Total gross taxes (basic and additional) (Tentative Tax)	$40,600	
7. Gross basic tax	4,900	
8. Gross additional tax	$35,700	
9. Credit for gift tax	0	
10. Net additional tax		$35,700
11. Total net basic and additional taxes		$36,680
12. Defense tax		3,668
13. Total estate tax payable		$40,348

Example (2) (estate of decedent who died before September 21, 1941, subject to the additional estate tax and the defense tax only): A resident of the United States died on July 1, 1940, and the value of the gross estate is $85,000. Deductions for administration expenses and debts are allowed in the amount of $10,000, leaving $75,000 before the deduction of the specific exemption. As the specific exemption allowed by the Internal Revenue Code in determining the net estate upon which the basic estate tax is imposed is $100,000, it is apparent under Schedule P that this estate is not subject to such basic tax. However, as the specific exemption allowed by the Internal Revenue Code for the purpose of determining the additional estate tax is only $40,000, this estate is subject to such additional estate tax. For the purpose of the additional estate tax the net estate is $35,000 as would be shown under Schedule Q. The total gross taxes, shown in the first subcolumn of column 2 on a net estate equaling $30,000 are $1,200. As $35,000 exceeds $30,000 and falls below $40,000, the amount of the total gross taxes on the excess of $5,000 is computed at the rate of 8 per cent, the rate shown in the second subcolumn of column 2. The $400, computed on such excess, added to $1,200, gives $1,600, the total gross taxes. As no basic estate tax is imposed, this amount is the same as the gross additional tax, and since credit for gift tax is not involved in this example, the gross additional tax is the same as the net additional tax. It will be noted that no credit for estate, inheritance, legacy, or succession taxes is authorized in the computation of the additional tax. The decedent, having died after the date of the enactment of the Revenue Act of 1940 (June

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Computation of Tax.

(See instructions on reverse of Sheet XIX.)

1. Gross basic tax		$ 37,373.00	
2. Credit for gift tax			
3. Gross basic tax less credit for gift tax (item 1 minus item 2)		$ 37,373.00	
4. Credit for estate, inheritance, legacy or succession tax		29,898.40	
5. Net basic tax (item 3 minus item 4)			7,474.60
6. Total gross taxes (basic and additional) (Tentative Tax)		193,902.41	
7. Gross basic tax		37,373.00	
8. Gross additional tax (item 6 minus item 7)		156,529.41	
9. Credit for gift tax			
10. Net additional tax (item 8 minus item 9)			156,529.41
11. Total net basic and additional taxes (item 5 plus item 10)			164,004.01
12. Defense tax (10% of item 11)[1]			16,400.40
13. Total estate tax payable			180,404.41

Affidavit of Person or Persons Filing Return.

We, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Robert Michels, the undersigned execute or swear that we have carefully examined this return (including the additional sheets inserted, if any); that to the best of our knowledge, information, and belief, herein is listed all of the

[1] License tax applicable if decedent died after June 25, 1940, and before September 21, 1941.

property constituting the decedent's gross estate, as defined by the statute (or if the decedent was a nonresident alien of the United States, herein is listed all of the property constituting the gross estate situated in the United States, as defined by the statute, and, if deductions are claimed, herein is listed separately all of the property constituting the gross estate situated outside the United States); that we have no knowledge of any transfers made or trusts created by the decedent during his lifetime of the value of $5,000 or more, other than bona fide sales for an adequate and full consideration in money or money's worth, except as stated in Schedule G; and that, to the best of our knowledge, information, and belief, the fair market value as of the date of the decedent's death is shown for every item of property listed herein under the gross estate (and, in case the optional valuation is herein adopted, that all of the distributions, sales, exchanges, and other dispositions within the year following the decedent's death of the property included in the gross estate, together with the dates thereof, are fully disclosed, and that the value under the option for every item of property is the fair market value as of the applicable valuation date or is such value as properly adjusted), that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable, and that all statements made herein are true and correct.

(Signature) Katherine J. Spiegel,
(Address) 410 Sheridan Road,
Winnetka, Ill.
(Signature) Sidney M. Spiegel,
(Address) 540 N. Michigan Ave.,
Chicago, Ill.
(Signature) Robert Michels,
(Address) 540 N. Michigan Ave.,
Chicago, Ill.

Sworn to and subscribed before me this 17th day of March, 1942.

(Notarial Seal.)

William C. Brooks,
Notary Public.
(Signature and title of officer administering oath)

Affidavit of Attorney or Agent Preparing Return.

I swear that I prepared this return for the person or persons signing the above affidavit and that this return, including the additional sheets inserted, if any, is a true, correct, and complete statement of all the information respecting the estate tax liability of this estate of which I have any knowledge.

(Signature) R. H. Charisman.
(Associated with Mayer Meyer Austrian & Platt.)
(Address)

Sworn to and subscribed before me this 17th day of March, 1942.

(Notarial Seal.) William C. Brooks,
Notary Public.

Estate of Sidney M. Spiegel, Deceased.

106 Instructions for Computation of Tax—Continued.

25, 1940) and prior to September 21, 1941, the defense tax imposed is 10 per cent of the net additional tax of $1,600 or $160. Consequently, the total tax payable in this case is $1,760.

Example (3) (estate of decedent who died before September 21, 1941, subject to the basic tax, the additional tax and the defense tax, and involving credits for State inheritance tax and for gift tax): The decedent, a resident of the United States, died on July 15, 1940. The total value of the gross estate is $490,000, the value of the net estate for the purpose of the basic estate tax is $225,000 and the value of the net estate for the purpose of the additional tax is $285,000. The gross basic tax computed on the net estate of $225,000 is $5,500 and the total gross taxes on the net estate of $285,000 are $43,600. (See explanation in the above examples of the use of the table in computing the tax.) The decedent transferred on January 15, 1940, in contemplation of death, certain real estate to his daughter as a gift. The value of the real property as of the date of the gift, and as of the time of death, was $144,000. As the result of this gift, a gift tax of $7,200 was paid on a net gift of $100,000 ($4,000 excluded and the specific exemption of $40,000 deduction under the gift tax provisions of the

Internal Revenue Code). As the value of the transferred real property is included in the decedent's gross estate, a credit for gift tax is allowed against the gross basic tax, $5,500, not to exceed the proportion of $5,500, item 1, that the value of the included gift, $140,000, bears to the entire gross estate, $400,000. It will be noted that the amount of the included gift is $144,000 less $4,000, the amount excluded in determining the amount for purposes of the gift tax. This proportion, which is ascertained by dividing $145,000 by $400,000, is 0.35. The gift tax credit allowed against the estate's basic tax is, therefore, 0.35 of $5,500, or $1,925, which is entered at item 2. The difference between $5,500 and $1,925 is entered at item 3. Maximum credit for State inheritance and estate taxes is allowed in this example in the amount of $2,860, entered at item 4. The net basic tax is $715, item 5. The total gross taxes of $43,600 are entered at item 6, the gross basic tax of $5,500 is entered at item 7, and the gross additional tax of $38,100 is entered at item 8. Credit for the gift tax paid ($7,200) is allowed against the gross additional tax, not to exceed the proportion of $38,100, item 8, that the value of the included gift, $140,000, bears to the entire gross estate, $400,000. The amount of this proportion is $13,335. However, this credit is further limited by an amount not to exceed the difference between the total of the gift tax, $7,200, and the credit, $1,925, allowed for such tax against the gross basic tax. This difference, $5,275, is the amount of the credit allowed against the gross additional tax, and is entered at item 9. The net additional tax, item 8 minus item 9, is $32,825, and is entered at item 10. The total net basic and additional taxes of $33,540 (item 5 plus item 10) is shown at item 11. The defense tax, which is applicable in this case, is $3,354 (10 per cent of item 11) and is entered at item 12. The total tax payable, $36,894, is entered at item 13. The computation of the tax in this example is set up as follows:

1.	Gross basic tax	$ 5,500	
2.	Credit for gift tax	1,925	
3.	Gross basic tax less credit for gift tax	$ 3,575	
4.	Credit for estate, inheritance, legacy, or succession tax	2,860	
5.	Net basic tax		$715
6.	Total gross taxes (basic and additional) (Tentative Tax)	$43,600	
7.	Gross basic tax	5,500	
8.	Gross additional tax	$38,100	
9.	Credit for gift tax	5,275	
10.	Net additional tax		$32,825
11.	Total net basic and additional taxes		$33,540
12.	Defense tax		3,354
13.	Total estate tax payable		$36,894

Example (4) (estate of decedent who died after September 20, 1941, subject only to the additional tax): A resident of the United States died on September 30, 1941, and the value of the gross estate is $75,000. Deductions for administration expenses and debts are allowed in the amount of $10,000, leaving $65,000 before the deduction of the specific exemption. As the specific exemption allowed by the Internal Revenue Code in determining the net estate upon which the basic estate tax is imposed is $100,000, it is apparent under Schedule P that this estate is not subject to such basic tax. However, as the specific exemption allowed by the Internal Revenue Code for the purpose of determining the additional estate tax is only $40,000, this estate is subject to such additional estate tax. For the purpose of the additional estate tax the net estate is $25,000, as would be shown under Schedule Q. The total gross taxes, shown in the first subcolumn of column 3 on a net estate equaling $20,000 are $1,600. As $25,000 exceeds $20,000 and falls below $30,000, the amount of the total

gross taxes on the excess of $5,000 is computed at the rate of 14 per cent, the rate shown in the second subcolumn of column 3. The $700, computed on such excess, added to $1,600, gives $2,300, the total gross taxes. Since no basic estate tax is imposed, this amount is the same as the gross additional tax, and since credit for gift tax is not involved in this example, the gross additional tax is the same as the net additional tax. (No credit for estate, inheritance, legacy, or succession taxes is authorized in the computation of the additional tax.) It will be noted that since the decedent died after the date of the enactment of the Revenue Act of 1941 (September 20, 1941), no defense tax is imposed upon such net additional tax. Consequently, the total tax payable in this case is $2,300.

107 Last Will and Testament
of
Sidney M. Spiegel,
Deceased

Admitted to probate by Probate Court of Cook County, Illinois, and Letters Testamentary issued to Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Robert Michels, on December 26, 1940.

Docket 399 Page 428 File 40 P 9062

Date of Death, December 19, 1940.

108 I, Sidney M. Spiegel, of Winnetka, County of Cook and State of Illinois, being of sound and disposing mind and memory, do hereby make, declare and publish this to be my last will and testament, hereby revoking any and all wills and codicils thereto by me at any time heretofore made:

First: I direct that all of my just debts and funeral expenses be first paid out of my estate.

My Executors, hereinafter appointed, shall pay, out of my estate and as part of the expenses of administration thereof, all Federal, State and other estate, inheritance, transfer and similar taxes imposed upon my said Execu-

tors, or my said estate, or upon any beneficiary under this Will by reason of any interest which such beneficiary may take under this Will.

Second: All of the rest, residue and remainder of my estate, of whatsoever kind or nature, whether real, personal or mixed and wheresoever situate, of which I may die seized or possessed or to or in which I have, at the date of my death, any right, title or interest (hereinafter referred to as my "residuary estate"), I hereby give, devise and bequeath as follows:

(a) To my beloved daughter, Katherine J. Spiegel, if she shall survive me, seventy-five per cent (75%) in value, as determined by my said Executors, of my said residuary estate.

(On left-hand margin—(Sgd.) Sidney M. Spiegel)

109 I have made the provision in this sub-clause (a) set forth for my said daughter, Katherine J. Spiegel, not on account of any greater love or affection for her than for my other children, but because so much of her life has been devoted to me and my welfare and also on account of other circumstances which I believe make such provision proper.

In the event that my said daughter, Katherine, shall predecease me, then, and in such event, said seventy-five per cent (75%) in value of my said residuary estate shall go, in equal shares per stirpes, to Katherine's descendants who shall survive me; provided, however, that, in the event that there shall be no such surviving descendant, then such seventy-five per cent (75%) in value of my said residuary estate shall go in equal shares to my beloved daughter, Julia S. Michels, and my beloved son, Sidney M. Spiegel, Jr., and, in the event either or both thereof shall predecease me, the descendants, who shall survive me, of said deceased daughter, Julia, or such deceased son, Sidney, shall take, in equal shares per stirpes, the respective share of said seventy-five per cent (75%) in value of my said residuary estate, which said deceased daughter, Julia, or deceased son, Sidney, would have taken had she or he survived me, or, in the event that either my said daughter, Julia, or my said son, Sidney, shall predecease me and shall leave no descendant who shall survive me, then the share of said seventy-five per cent (75%) in value of my said residuary estate which said deceased daughter, Julia, or deceased son, Sidney, would have taken had she or he

(On left-hand margin—(Sgn.) Sidney M. Spiegel)

110 survived me, shall go to the one of my said daughter, Julia, or my said son, Sidney, who shall survive me, or, in the event both thereof shall predecease me, then, in equal shares per stirpes, to the descendants, who shall survive me, of my said daughter, Julia, or my said son, Sidney.

(b) To said daughter, Julia, if she shall survive me, twenty-five per cent (25%) in value, as determined by my said Executors, of my said residuary estate.

In the event that my said daughter, Julia, shall predecease me, then, and in such event, said twenty-five per cent (25%) in value of my said residuary estate shall go in equal shares per stirpes, to Julia's descendants who shall survive me; provided, however, that, in the event that there shall be no such surviving descendant, then such twenty-five per cent (25%) in value of my said residuary estate shall go in equal shares to my said daughter, Katherine, and my said son, Sidney, and, in the event either or both thereof shall predecease me, the descendants, who shall survive me, of such deceased daughter, Katherine, or such deceased son, Sidney, shall take, in equal shares per stirpes, the respective share of said twenty-five per cent. (25%) in value of my said residuary estate, which said deceased daughter, Katherine, or deceased son, Sidney, would have taken had she or he survived me, or, in the event that either my said daughter, Katherine, or my said son, Sidney, shall predecease me and shall leave no descendant who shall survive me, then the share of said twenty-five per cent (25%) in value of my said residuary estate which said deceased daughter,

(On left-hand margin—(Sgd.) Sidney M. Spiegel)

111 Katherine, or deceased son, Sidney, would have taken had she or he survived me, shall go to the one of my said daughter, Katherine, or my said son, Sidney, who shall survive me, or in the event both thereof shall predecease me, then, in equal shares per stirpes, to the descendants, who shall survive me, of my said daughter, Katherine, or my said son, Sidney.

I have left no portion of my said residuary estate unconditionally to my said son, Sidney. I have not left him unconditionally any portion of said residuary estate because I believe that the provision I have made for him during my lifetime, together with his income derived from his business, should be sufficient amply to provide for his

needs. In any event, I feel that he, as a man, should be able to provide for himself much more readily than his sisters would be able to do.

Third: I hereby nominate and appoint my said daughter, Katherine J. Spiegel, my said son, Sidney M. Spiegel, Jr., and my son-in-law, Robert Michels, or such of them as may be qualified and willing to act, and the survivors and survivor of them, Executors of this my last will and testament, and I direct that none of them shall be required to give any surety or security on her or his bond for the faithful performance of her or his duties as such Executor hereunder. I hereby give to them, and the survivors and survivor of them, as such Executors, full, complete and

(On left-hand margin—(Sgd.) Sidney M. Spiegel)

112 absolute power, without order or authority from any court, to manage and control my estate in such manner as to them shall seem best, and to sell, lease (for any term whatsoever, including ninety-nine years or shorter leases and leases to commence in futuro), mortgage, encumber, pledge, hypothecate or otherwise dispose of all or any part of my estate, and, in short and without any limitation whatsoever, to do any and all things in and about the management and control of said estate which they could do if they were the absolute owners thereof.

The bequests and devises by this will made may be paid in whole or in part in money or in property, or in undivided interests in property, of the value specified in this will, and the determination by my said Executors of the value of any property constituting a portion of my said estate shall be conclusive and binding upon all interested persons. The fact that any Executrix or Executor hereunder may be interested in any bequest or devise under this will shall not prevent such Executrix or Executor from participating in the determination of any such valuation in connection with such bequest or devise or otherwise.

I have made no bequest for charitable, philanthrophic or educational purposes because I know that my children will, if in their judgment the amounts received by them respectively from my estate justify such course,

(On left-hand margin—(Sgd.) Sidney M. Spiegel)

113 make such gifts for such purposes, as would accord with my wishes in that regard.

In Witness Whereof, I have hereunto set my hand and seal, at Chicago, Illinois, this 20 day of April, A. D. 1938.

Sgd Sidney M. Spiegel. (Seal)

The foregoing Last Will and Testament, consisting of six (6) typewritten pages, this page included, was, by the Testator, Sidney M. Spiegel, signed, sealed, published and declared to be his Last Will and Testament in our presence and on the date it bears, and we have, at his request and in his presence and in the presence of each other, hereunto subscribed our names as witnesses thereto, this 20th day of April, 1938. We do hereby certify that, in our opinion, the said Testator was, at the time of such signing, sealing, publishing and declaring, of sound and disposing mind and memory.

Herbert A. Friedlich,
Residing at Highland Park, Ill.

Richard Grossman,
Residing at 5750 Kenwood Ave., Chicago, Ill.

Benjamin A. Ragir,
Residing at 4724 Drexel Blvd., Chicago, Ill.

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Codicil.

I, Sidney M. Spiegel, of Winnetka, County of Cook and State of Illinois, being of sound and disposing mind and memory, do hereby make, declare and publish the following to be a Codicil to my Last Will and Testament dated April 20, 1938:

First: I hereby add to, and include in, said Last Will and Testament, with the same force and effect as if therein originally set forth, the following additional clause to be known as clause "Second":

"Second: I hereby give and bequeath:

(a) To Theresa Siegel, now in my employ as a maid, the sum of Fifteen Hundred Dollars ($1500.00).

(b) To Elida Carlson, now in my employ as a maid, the sum of Five Hundred Dollars ($500.00).

(c) To Harry Kneibes, now in my employ as a gardener, the sum of Three Hundred Dollars ($300.00).

(d) To Magnus Janson, now in my employ as a chauffeur, the sum of Fifteen Hundred Dollars ($1500.00).

(e) To Florence Nierman, now in my employ as secretary, the sum of Fifteen Thousand Dollars ($15,000.00).

In the event, however, that any of the above named persons shall not be in my employ at the date of my death, or shall die prior to the date of my death, the bequest, in this clause Second contained, to such person, not then in my employ or so dying, shall lapse. All lapsed legacies shall be added to, and be deemed a part of, my residuary estate hereinafter mentioned."

115 Second: The present clause "Second" of said Last Will and Testament shall be deemed to be renumbered "Third" and the present clause "Third" of said Last Will and Testament shall be deemed to be renumbered "Fourth".

Third: Except as by this Codicil specifically amended, said Last Will and Testament shall remain in full force and effect as originally published and declared, and I hereby republish and redeclare said Last Will and Testament, as amended by this Codicil, as and for and to be my Last Will and Testament.

In Witness Whereof, I have hereunto set my hand and seal at Chicago, Illinois, this 15 day of June, A.D. 1938.

(Sgd.) Sidney M. Spiegel (Seal.)

The foregoing Codicil, consisting of two (2) typewritten pages (this page included), was by the Testator, Sidney M. Spiegel, signed, sealed, published and declared to be a Codicil to his Last Will and Testament dated April 20, 1938, in our presence and on the date said Codicil bears, and we have, at this request and in his presence and in the presence of each other, hereunto subscribed our names as witnesses to said Codicil, this 15th day of June, 1938. We do hereby certify that, in our opinion, the said Testator was, at the time of such signing, sealing, publishing and declaring, of sound and disposing mind and memory.

Donald M. Graham,
Residing at 2430 Greenleaf, Chicago, Illinois.

Benjamin A. Ragir,
Residing at 4524 Drexel Blvd., Chicago, Ill.

Richard Grossman,
Residing at 5750 Kenwood Ave., Chicago, Ill.

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STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE PROBATE COURT OF COOK COUNTY.

Will and Codicil proved and admitted to record in open Court this 26th day of December, A. D. 1940.

John F. O'Connell,
Probate Judge.

Frank Lyman,
Clerk of the Probate Court.

Clerk's Certificate—Form 42 "a" (2).

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Frank Lyman, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be true and correct copies, respectively, of the last will and testament and codicil thereto, of Sidney M. Spiegel, deceased, as appears from the originals on file and from the records of the Probate Court in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 5 day of Mar., A. D. 1941.

Frank Lyman,
Clerk of the Probate Court.

Letters Testamentary Form 16.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE PROBATE COURT OF COOK COUNTY.

In the Matter of the Estate of Sidney M. Spiegel, Deceased. } File 40P 9062 Docket 399 Page 428

Know all men by these presents that Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Robert Michels 117 have been appointed executors of the will and codicil thereto of Sidney M. Spiegel, deceased, who died on the 19th day of December, 1940, and are authorized to sue for and collect the personal estate of and debts due the decedent and to perform all duties imposed on them by the will and codicil thereto, so far as there is property and the law charges them; and to do all other acts now or hereafter required of them by law.

Witness, Frank Lyman, Clerk of the Probate Court of Cook County, and the seal of the Court, this 26th day of December, 1940.

Frank Lyman,
Clerk.

(Seal)

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, Frank Lyman, Clerk of the Probate Court of Cook County, Illinois, do hereby certify that the within is a true and correct copy of the letters testamentary issued on the 26th day of December, 1940, to Katherine J. Spiegel, Sidney M. Spiegel, Jr. and Robert Michels, upon the last will and codicil thereto of Sidney M. Spiegel, deceased, now in force, as it appears from the original on file and from the records of the Court in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Court, at Chicago, in said County, this 5 day of March, 1941.

Frank Lyman,
Clerk.

96 TABLE FOR COMPUTATION OF ESTATE TAX. 119

(A)	(B)	(1) For basic estate tax		(2) For additional estate tax (tentative tax—total gross basic and additional taxes) In effect prior to September 21, 1941		(3) For additional estate tax (tentative tax—total gross basic and additional taxes) In effect after September 20, 1941	
Net estate equalling—	Net estate not exceeding—	Tax on amount in column (A)	Rate of tax on excess over amount in column (A)	Tax on amount in column (A)	Rate of tax on excess over amount in column (A)	Tax on amount in column (A)	Rate of tax on excess over amount in column (A)
			Percent		Percent		Percent
	$5,000		1		2		3
$5,000	10,000	$50	1	$100	2	$150	7
10,000	20,000	100	1	200	4	500	11
20,000	30,000	200	1	600	6	1,600	14
30,000	40,000	300	1	1,200	8	3,000	18
40,000	50,000	400	1	2,000	10	4,800	22
50,000	60,000	500	2	3,000	12	7,000	25
60,000	70,000	700	2	4,200	12	9,500	28
70,000	100,000	900	2	5,400	14	12,300	28
100,000	200,000	1,500	3	9,600	17	20,700	30
200,000	250,000	4,500	4	26,600	20	50,700	30
250,000	400,000	6,500	4	36,600	20	65,700	32
400,000	500,000	12,500	5	66,600	23	113,700	32
500,000	600,000	17,500	5	89,600	23	145,700	33
600,000	750,000	22,500	6	112,600	26	180,700	35
750,000	800,000	31,500	6	151,600	26	233,200	37
800,000	1,000,000	34,500	7	164,600	29	251,700	37
1,000,000	1,250,000	48,500	8	222,600	32	325,700	39
1,250,000	1,500,000	68,500	8	302,600	32	423,200	42
1,500,000	2,000,000	88,500	9	382,600	35	528,200	45
2,000,000	2,500,000	133,500	10	557,600	38	753,200	49
2,500,000	3,000,000	183,500	11	747,600	41	998,200	53
3,000,000	3,500,000	238,500	12	952,600	44	1,263,200	56
3,500,000	4,000,000	298,500	13	1,172,600	47	1,548,200	59
4,000,000	4,500,000	363,500	14	1,407,600	50	1,838,200	62
4,500,000	5,000,000	433,500	14	1,657,600	53	2,153,200	62
5,000,000	6,000,000	503,500	15	1,922,600	56	2,468,200	67
6,000,000	7,000,000	653,500	16	2,482,600	59	3,138,200	70
7,000,000	8,000,000	813,500	17	3,072,600	61	3,828,200	73
8,000,000	9,000,000	983,500	18	3,682,600	63	4,568,200	75
9,000,000	10,000,000	1,163,500	19	4,312,600	65	5,328,200	78
10,000,000	20,000,000	1,353,500	20	4,962,600	67	6,088,200	77
20,000,000	50,000,000	3,353,500	20	11,662,600	69	13,788,200	77
50,000,000		9,353,500	20	32,362,600	70	36,888,200	77

119 (Space for Use of Bureau) Sheet XXI

Tax on Return or Deficiency	Assessments: Amount	List	Page	Line	Payments: Date	Principal	Interest
Ret. Tax	180,404.41	Mar. 1942	104	5	3-19-42	180,404.41	

Determination by Bureau

tional tax tax le and taxes) after 20, 194	Rate of tax on excess over amount in column (A)
	Percent
	3
	11
	14
	18
	22
	26
	30
	32
	35
	38
	42
	45
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120 THE TAX COURT OF THE UNITED STATES.

Estate of Sidney M. Spiegel, Deceased, Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 1662.

Harry Thom, Esq., for the petitioners.

Harold H. Hart, Esq., for the respondent.

The Commissioner determined a deficiency of $454,788.58 in estate tax. The only question is whether the value of the corpus of a trust created by the decedent during his lifetime is includable in gross estate under Section 811 (c), Internal Revenue Code.

FINDINGS OF FACT.

The petitioners are the executors of the estate of Sidney M. Spiegel, who was born August 16, 1872, and died testate on December 19, 1940. The executors filed the estate tax return in Chicago, Illinois. The decedent left him surviving two daughters, Katherine J. Spiegel, born March 1, 1897, and Julia S. Michels, born March 7, 1907, a son, Sidney M. Spiegel, Jr., born August 8, 1904, and three grandchildren, Robert Michels, Jr., born August 21, 1930, Helen Katherine Michels, born November 17, 1936, and Sydney Ann Michels, born November 14, 1938.

On January 2, 1920, the decedent made an agreement by which he transferred in consideration of one dollar and other considerations, to Modie J. Spiegel and Sidney M. Spiegel, as trustees, 625 shares of Spiegel's House Furnishing Company, and 750 shares of Spiegel May Stern Company, in trust, for the uses and purposes and upon the terms and conditions in part as follows:

1. The said Trustees, and the survivor of them, or any successor trustee, shall have full, absolute and complete power to hold, manage and control said shares and every part thereof; to sell, exchange, transfer or otherwise dispose of the same, or any part thereof, and to invest and reinvest the proceeds derived from any such sale or sales, or other disposition

of said shares, or any part thereof, during the continuance of this trust. While said shares of stock, or any substitutes therefor, are held by said Trustees, or the survivor of them, or any successor Trustee, if any corporation whose stock or other securities are held by said Trustees should require any action of any kind to be taken, said Trustees, and the survivor and any successor trustee, shall have the same right to take any action which may be required of any stockholder or holder of any securities of any such corporation as if said Trustees, and the survivor and any successor held such shares or said securities in their own individual names and were the sole owners thereof.

2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of each of my three (3) children, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Julia K. Spiegel, —such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and for per capita.

3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said
122 children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died

without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

The property was delivered to and accepted by the trustees on the date of the trust agreement.

Until the death of the grantor, the income of the trust was distributed to or for the benefit of the grantor's three children.

The estate tax return showed a net taxable estate of $841,042.81 for the basic tax and a net taxable estate of $901,042.81 for the additional tax, the executors having elected to value the property as of one year from the date of death under Section 811 (j) of the Internal Revenue Code. The tax shown on the return was $180,404.41 and was paid on March 19, 1942. No part of the corpus held by the trustees was included in the gross estate shown on the return. In recomputing the estate tax the Commissioner included in gross estate $1,140,606.30, the fair market value of the entire trust corpus, and accumulated income held by the trustees on December 19, 1940, the agreed date for the purposes of Section 811 (j), Internal Revenue Code, of the distribution of the property to the three beneficiaries. Following the death of the grantor the entire corpus and accumulated income were distributed equally to his three children.

The transfers of the property to the above trust on January 2, 1920, were not made in contemplation of death.

The value, computed on the basis of the mortality table and on the basis of the assumed interest rate prescribed in the Treasury Regulations applicable to federal estate taxes, of the right of a person aged 68 years to receive $1.00 on the date of death of the one last to die of six other persons, aged 44, 36, 34, 10, 4 and 2 years, provided said person aged 68 years would survive all of the six other persons, is .00007384. The probability, computed on the basis of the mortality table prescribed by Treasury Regulations applicable to federal estate taxes, that a person aged 68 years will survive six other persons of the ages of 44, 36, 34, 10, 4 and 2 years is .00015635. The value, computed on the basis of the mortality table and on the basis of the assumed interest rate prescribed

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in the Treasury Regulations applicable to federal estate taxes, of the right of a person aged 47 years to receive $1.00 on the date of the death of the one last to die of three other persons aged 13, 15 and 23 years is .00390. The probability, computed on the basis of the mortality table prescribed in Treasury Regulations applicable to federal estate taxes, that a person aged 47 years will survive three other persons of the ages of 13, 15 and 23 years is .01612.

The petitioners are entitled to a deduction from gross estate of $20,000 for executors' fees allowed by the Probate Court of Cook County and paid.

MEMORANDUM OPINION.

Mernhagen, *Judge*: The decedent had created an irrevocable trust in 1920, the income of which was distributable from that time forth to his children and the corpus was to be distributed to the children when he died. He died in 1940. The Commissioner, citing Internal Revenue Code, Section 811(c), has included the corpus in the decedent's gross estate. We are of opinion that this determination of the Commissioner must be reversed, on the authority of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Commissioner* v. *Estate of Flora W. Lasker*, 141 Fed. 124 (2d) 889. The decedent in creating the trust retained no "string or tie" amounting to a possibility of reversion, and hence the doctrine of *Helvering* v. *Hallock*, 309 U. S. 106, and numerous decisions deriving from it, are not in point.

Enter: Feb. 24, 1945.

Decision will be entered under Rule 50.

(Seal)

125 THE TAX COURT OF THE UNITED STATES

(Caption—1662)

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION.

(Filed Mar. 26, 1945.)

The attached proposed computation is submitted on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

(Signed) J. P. Wenchel
J.D.K.
J. P. Wenchel,
Chief Counsel
Bureau of Internal Revenue

Of Counsel:
John D. Kiley
Division Counsel
Harold H. Hart
Special Attorney
Bureau of Internal Revenue

126 C-TS:CD
AP:AVK

Mar. 6, '45.

STATEMENT

In re: Estate of Sidney M. Spiegel, Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors, 540 North Michigan Avenue, Chicago 11, Illinois.

Docket: #1662.

Date of Death: December 19, 1940.

Estate Tax Liability.

Tax Liability	Tax Assessed	Overassessment
$177,980.46	$180,404.41	$2,423.95
Tax Liability	**Tax Paid**	**Overpayment**
$177,980.46	$180,404.41	$2,423.95

The adjustments shown in the attached schedules have been made in accordance with the opinion of the Tax Court of the United States entered February 24, 1945 for decision under Rule 50.

AVanKnoy/lmg
3-5-45.

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Estate of Sidney M. Spiegel.

Date of Death
December 19, 1940

Schedule 1

Net Estate

	Basic Tax	Additional Tax
Net estate as shown in deficiency notice dated February 16, 1943	$1,992,232.02	$2,052,232.02
As adjusted	831,625.72	891,625.72
Adjustment	$1,160,606.30	$1,160,606.30
Decrease:		
(a) Transfers		$1,140,606.30
(b) Executors' fees		20,000.00
Total decrease		$1,160,606.30

Schedule 2

Explanation of Adjustments.

(a) The value of the corpus of a trust created by the decedent during his lifetime is not included in gross estate under Section 811(c) of the Internal Revenue Code.

(b) Petitioners are allowed a deduction from gross estate of $20,000.00 for executors' fees.

Schedule 3

Computation of Tax.

Net estate for basic tax		$831,625.72
Net estate for additional tax		$891,625.72
Basic Tax:		
Tax on $800,000.00	$ 34,500.00	
Tax at 7% on $31,625.72	2,213.80	
Gross Basic Tax	$36,713.80	
Less: Credit for state inheritance tax paid (80%)	29,371.04	
Net basic tax		$ 7,342.76
Additional Tax:		
Tax on $800,000.00	$164,600.00	
Tax at 29% on $91,625.72	26,571.46	
Gross basic and additional tax	$191,171.46	
Less: Gross basic tax	36,713.80	
Net additional tax		$154,457.66
128 Total basic and additional tax		$161,800.42
Defense tax, 10%		16,180.04
Total tax liability		$177,980.46
Tax assessed March 1942 Page 104, Line 5		180,404.41
Overassessment		$ 2,423.95
Estate tax liability		$177,980.45
Estate tax paid: March 19, 1942		180,404.41
Overpayment, Section 912 of the Internal Revenue Code		$ 2,423.95

No Claim for refund filed.

Deficiency notice dated February 16, 1943.

Petition filed May 14, 1943, within the period of three years from the date of payment of the tax.

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To: THE TAX COURT OF THE UNITED STATES.

(Caption—1662)

(Filed Apr. 2, 1945.)

The computation of the respondent filed with the Court on March 26, 1945 has been examined and found to be in accordance with the determination of the Court as set forth in its report. Petitioner therefore joins with the respondent in praying that the Court enter its decision based upon such computation, reserving however the right to contest the correctness of such decision in the appellate courts as provided by statute.

(s) Harry Thom
231 S. LaSalle Street,
Chicago, Illinois.

130 THE TAX COURT OF THE UNITED STATES.

(Caption—1662)

DECISION.

Pursuant to the Court's Findings of Fact and Memorandum Opinion, entered February 24, 1945, the respondent filed a computation which the petitioner agrees is in accordance with the opinion. It is

Decided that there is an overpayment in estate tax of $2,423.95, which amount was paid within three years before the mailing of the notice of deficiency.

(Signed) J. M. Sternhagen,
Judge.

(Seal)

Entered Apr. 3, 1945.

131 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—1662)

PETITION FOR REVIEW

(Filed Jun 29, 1945)

The Commissioner of Internal Revenue, petitioner on review herein, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the Seventh Circuit to review the decision entered by the Tax Court of the United States on April 3, 1945, ordering and deciding that there is an overpayment in estate tax of $2,423.05. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

The respondents on review, Sidney M. Spiegel, Jr., Katherine J. Spiegel, and Robert Michels, are the duly appointed, qualified and acting executors of the Estate of Sidney M. Spiegel, deceased, who died a resident of Winnetka, Illinois, on December 19, 1940. The estate tax return made for and on behalf of said decedent's estate was filed by the said executors with the Collector of Internal Revenue for the First Collection District of Illinois, which collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit, wherein this review is sought.

(Sg'd) Samuel O. Clark, Jr.,
Assistant Attorney General.
(Signed) J. P. Wenchel,
C.A.R.
Chief Counsel,
Bureau of Internal Revenue
Attorneys for Petitioner
on Review.

Of Counsel:
John T. Rogers,
Special Attorney
Bureau of Internal Revenue

132 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—1662)

STATEMENT OF POINTS TO BE RELIED UPON.

(Filed Jun 29, 1945.)

Now Comes the Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that the transfer in trust made by the decedent on January 2, 1920, was not a transfer intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

2. In failing to hold and decide that said transfer of January 2, 1920, was a transfer testamentary in character and was intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

3. In that its decision is contrary to the law and the Regulations and is not supported by substantial ev-
133 idence.

4. In ordering and deciding that there is an overpayment in estate tax of $2,423.95.

5. In failing to order and decide that there is a deficiency in estate tax of $454,788.58.

(Sg'd) Samuel O. Clark, Jr.
Assistant Attorney General.
(Signed) J. P. Wenchel,
G. A. R.
Chief Counsel.
Bureau of Internal Revenue.
Attorneys for Petitioner on Review.

134 In the United States Circuit Court of Appeals.

(Caption—1662)

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS TO BE RELIED UPON.

(Filed Jun 30, 1945.)

To: Harry Thom, Esq.,
231 South LaSalle Street
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 29th day of June, 1945, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case, together with a statement of points to be relied upon. A copy of the petition for review and a copy of statement of points as filed are hereto attached and served upon you.

Dated this 30th day of June, 1945.

(S) B. D. Gamble,
Clerk,
The Tax Court of the United States.

Service of copy of petition for review and statement of points acknowledged this 2nd day of July 1945.

(S) Harry Thom,
Attorney for Respondent on Review.

135 In the United States Circuit Court of Appeals.

(Caption—1662)

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS TO BE RELIED UPON.

(Filed July 20, 1945.)

To: Katherine J. Spiegel,
540 North Michigan Avenue,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 29th day of June, 1945, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case, together with a statement of points to be relied upon. A copy of the petition for review and a copy of statement of points as filed are hereto attached and served upon you.

Dated this 29th day of June, 1945.

(Signed) Samuel O. Clark, Jr. C.A.R.
Assistant Attorney General.
(Signed) J. P. Wenchel, C.A.R.
Chief Counsel.
Bureau of Internal Revenue.
Attorneys for Petitioner on Review.

Personal service of the above and foregoing notice, together with copies of the petition for review and statement of points mentioned therein, is hereby acknowledged this 3 day of July 1945.

(S) Katherine J. Spiegel,
Respondent on Review.

136 In the United States Circuit Court of Appeals.

(Caption—1662)

NOTICE OF FILING PETITION FOR REVIEW AND STATEMENT OF POINTS TO BE RELIED UPON.

(Filed, July 20, 1945.)

To. Robert Michels,
540 North Michigan Avenue,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 29th day of June, 1945, file with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case, together with a statement of points to be relied upon. A copy of the petition for review and a copy of statement of points as filed are hereto attached and served upon you.

Dated this 29th day of June, 1945.

(Signed) Samuel O. Clark, Jr. C.A.R.
Assistant Attorney General.
(Signed) J. P. Wenchel, C.A.R.
Chief Counsel,
Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

Personal service of the above and foregoing notice, together with copies of the petition for review and statement of points mentioned therein, is hereby acknowledged this 6th day of July, 1945.

Robert Michels,
Respondent on Review.

137 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—1662)

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW.

(Filed Sep 11, 1945t)

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings before the Tax Court:

(a) Petition, together with attached Exhibit A (notice and Statement of Deficiency.)

(b) Answer.

(c) Petitioner's (taxpayer's) motion to amend petition, together with court's order entered thereon.

3. Stipulation of Facts, together with exhibits referred to therein and attached thereto.

4. Transcript of the proceedings before the Tax Court on September 26, 1944.

5. Memorandum Findings of Fact and Opinion of the Tax Court.

6. (a) Respondent's (Commissioner's) computation for entry of decision under Rule 50, together with taxpayer's consent thereto.

(b) Decision of the Tax Court.

138 7. Petition for Review and Statement of Points to be Relied Upon, together with proof of service of notice of filing Petition for Review and of service of a copy of Petition for Review and proof of service of notice of filing Statement of Points and of service of a copy of Statement of Points.

8. Any and all orders made by the Court with respect

to the enlargement of time for the preparation and transmission of the record on review, not included in record.

9. This Designation of Portions of Record, Proceedings, and Evidence to be contained in Record on Review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

(Sg'd) Samuel O. Clark, Jr., C.A.R.
Assistant Attorney General.
(Signed) J. P. Wenchel, C.A.R.
Chief Counsel,
Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted and agreed to this 21st day of August, 1945.

Harry Thom,
Attorney for Respondent on Review.

139 THE TAX COURT OF THE UNITED STATES

(Caption—1662)

ORDER ENLARGING TIME.

Upon motion of counsel for petitioner, it is Ordered that the time for preparation, transmission and delivery of the record *sur* petition for review of the above-entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit is extended to September 26, 1945.

(Signed) Bolon B. Turner,
Presiding Judge.

Dated: Washington, D. C.
July 28, 1945.

Now: Sept. 20, 1945, the foregoing order is certified from the record as a true copy.

(Seal)

B. D. Gamble,
Clerk.

Commissioner of Internal Revenue, *Petitioner*, v. Estate of Sidney M. Spiegel, Dec'd., Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels, Executors Under The Last Will and Testament of Sidney M. Spiegel, Dec'd. *Respondent.*	Docket No. 1662

Certificate.

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 134, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of September, 1945.

B. D. Gamble,
Clerk,
The Tax Court of the United States.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed and filed on the fourth day of May, 1946, in:

Cause No. 8932.

Commissioner of Internal Revenue,
Petitioner,

vs.

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 27th day of February, A. D. 1947.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October, in the year of our Lord one thousand nine hundred and forty-four, and of our Independence the one hundred and sixty-ninth.

Commissioner of Internal Revenue, *Petitioner,* No. 8932 *vs.* Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.

And afterwards, to-wit: On the twenty-eighth day of September, 1945, there was filed in the office of the Clerk of this Court, and appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8932.

Commissioner of Internal Revenue,
Petitioner,

vs.

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.;
Respondents.

The Clerk will enter our appearance as counsel for Respondents.

Paul M. Godehn,
231 S. La Salle Street,
Chicago, Ill.

Harry Thom,
231 S. La Salle Street,
Chicago, Ill.

Mayer, Meyer, Austrian & Platt,
Of Counsel,
State 0600.

Endorsed: Filed September 28, 1945. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of May, 1946, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8932.

..... Term, 19.....

Commissioner of Internal Revenue,
Petitioner,

vs.

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.,
Respondents.

The Clerk will enter our appearances as counsel for the Petitioner.

J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue.

John T. Rogers,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed May 11, 1946. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of June, 1946, there was filed in the office of the Clerk of this Court, an appearance of counsel for Respondents, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8932.

Commissioner of Internal Revenue,
Petitioner,

vs.

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.,
Respondents.

The Clerk will enter our appearance as counsel for Respondents.

Herbert A. Friedlich,
Louis A. Kohn,
231 South La Salle St.,
Chicago, Ill.

Endorsed: Filed June 10, 1946. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eighteenth day of November, 1946, there was filed in the office of the Clerk of this Court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8932.

Com. of Int. Revenue,

vs.

Estate of Spiegel, etc.

The Clerk will enter appearance as counsel for Petitioner.

Melva M. Graney.

Endorsed: Filed November 18, 1946. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-first day of November, 1946, the following further proceedings were had and entered of record, to-wit:

Thursday, November 21, 1946.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner*, vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.
No. 8932	

Now this day this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Miss Melva M. Graney, counsel for Petitioner, and by Mr. Herbert A. Friedlich, counsel for Respondents, and the Court now takes this matter under advisement.

And afterwards, to-wit: On the twenty-eighth day of December, 1946, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8932. October Term and Session, 1946.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*
vs.
ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC., *Respondents.*

Petition for Review of Decision of the Tax Court of the United States.

December 28, 1946.

Before EVANS, KERNER, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* This is an appeal by the Commissioner of Internal Revenue from a decision of the Tax Court excluding from the provisions of the Estate Tax Law[1] the corpus and certain accumulated income thereon of an *inter vivos* trust executed by one Sidney M. Spiegel. The property conveyed in trust to Spiegel and another as trustees consisted of certain stocks. The trust provisions, as far as material here, are set forth in the margin.[2]

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1. Internal Revenue Code, Sec. 800 *et seq.* (26 U. S. C. 1940 Ed. Sec. 800 *et seq.*).

2. "2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of each of my three (3) children, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Julia K. Spiegel,—such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been en-

The chief question for us is whether the transfer in trust, executed in 1920, was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Sec. 811(e) of the Internal Revenue Code.[3]

If the trust provisions in this case had been made by will, the property would have been taxable. Did the settlor of the trust avoid the incidence of such tax by the execution of an *inter vivos* agreement?

The taxpayer contends that since the beneficiaries took a vested interest as to the corpus by the terms of the trust and had enjoyed the income therefrom during the settlor's life, the latter had completely divested himself of all interest in and to the property comprising the trust, and therefore there was nothing left to be taxed. This, it is claimed, is in accordance with the law of Illinois which the taxpayer contends is controlling. Under the Illinois law, the taxpayer argues, the beneficial interests transferred by this trust were vested and could be divested only by the strict and literal happenings provided in the trust instrument, and in no event could there be any property interest remaining in the settlor, nor could there be any possibility of the property ever reverting to the settlor or his estate,

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titled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and for per capita.

"3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita."

3. "Sec. 811. Gross Estate.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

"(c) Transfers in contemplation of, or taking effect at death. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *" (26 U. S. C. 1940 Ed., Sec. 811.)

apart from the possibility that he might take by inheritance from the deceased beneficiaries.

To support this proposition the respondent taxpayer cites certain Illinois cases.[4] These are cases involving property which was disposed of by will. In such cases the rights of the parties vest and are fixed at the death of the testator. There can be no divesting of such rights except as provided in the will. We think it could not be disputed that if there were no takers under the will at the time of the testator's death, the property would be intestate property. *Belleville Bank* v. *Aneshaensel*, 298 Ill. 292, 131 N. E. 682; *Dorsey, et al.* v. *Dodson, et al.*, 203 Ill. 32, 67 N. E. 395.

To have a case analogous to the possible case under the instant trust, you would have to have a situation where all takers were dead at the testator's death. In tax cases, we do not necessarily deal with situations as they are, but with situations *as they may be*. By the express terms of the trust under consideration, the beneficiaries could never take the full possession and enjoyment of the corpus of this trust except upon the condition provided in the trust instrument that some of the beneficiaries survive the settlor. If all of the beneficiaries were dead at the time the settlor died, and that was a possibility, the trust would fail. Thus there was a property interest remaining in the settlor that was terminated only by his death, and this was a sufficient interest for the estate tax to attach, pursuant to Sec. 811(c). We do not think that on the execution of the trust there was such vesting of the interests of the beneficiaries as there would be in the case of a will, which takes effect only as of the death of the testator. The conditions upon which the interests are to vest or not vest are all present at the time a will takes effect—at the death of the testator. But in a trust instrument, the conditions upon which the interests are to vest are not necessarily present at the time the trust instrument is executed. In the instant case the condition upon which the beneficiaries take the corpus is that they survive the settlor.

In considering the taxability of *inter vivos* transfers, we start with *Klein* v. *United States*, 283 U. S. 231, 233,

4. *Welch* v. *Crowe*, 278 Ill. 244, 115 N. E. 859; *Lachenmyer* v. *Gelbach*, 266 Ill. 11, 107 N. E. 202; *Illinois Land & Loan Co.* v. *Bonner*, 75 Ill. 315; *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110, 31 N. E. 2d 351.

234, 51 S. Ct. 398, 75 L. Ed. 996. In that case the grantor had by deed conveyed a life estate to his wife, but if she died before the grantor, the property reverted to him. If the wife survived the grantor, she received the fee. The Commissioner included the property in the estate of the grantor for estate tax purposes, and the administratrix of the grantor's estate paid the tax and sued the United States in the Court of Claims to recover. From a judgment against her, she appealed. The Supreme Court, affirming the Court of Claims, said:

> "It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen before that of the grantee. The grant of the remainder, therefore, was contingent. * * * The decisions of the Supreme Court of Illinois, the State where the deed was made and the property lies, support this conclusion. *Haward* v. *Peavey*, 128 Ill. 430, 439; 21 N. E. 503; *Baley* v. *Strahan*, 314 Ill. 213, 217; 145 N. E. 359. * * * Nothing is to be gained by multiplying in words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

Applying this law to the instant case, we think it follows that the interests under this trust did not vest upon the execution of the trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the beneficiaries or some of them survive the settlor, and this was the "event which brought the larger estate into being for the" beneficiaries. If none of the beneficiaries survived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare naked title to the corpus as resulting trustees for the settlor. *Restatement of the Law of Trusts*, Sec. 411(b); *Bogert, The Law of Trusts and Trustees*, Vol. II, Sec. 468; *Lill* v. *Brant*, 6 Ill. App. 366, 376. This possibility that the property might return to the settlor was sufficient

upon which to fasten the estate tax provisions. That the property might return to the settlor by operation of law rather than by the terms of the instrument is of no significance. *Commissioner of Internal Revenue* v. *Bank of California,* 155 F. 2d 1.

In *Helvering* v. *Hallock,* 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, all of the several trusts involved contained a provision whereby it was possible that the corpus of the property or a part of it might return to the settlor. In that case, the Supreme Court, upholding the tax on the trusts to the estate of the settlor and affirming *Klein* v. *United States, supra,* and overruling *Becker* v. *St. Louis Trust Company,* 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35, and *Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39, 56 S. Ct. 74, 80 L. Ed. 29, said: (p. 118)

> "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.
>
> "Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of Sec. 302(c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle."

It must always be remembered that we are dealing with a tax law that Congress intended should be uniform in its application, and that the provision we are dealing with was one to be used to close the escape mechanism of gifts *inter vivos* when the same transfer of property if made by will would be taxable. Congress did not intend that the tax liability should depend upon the name given to the piece of paper.

The Supreme Court said at page 112 of the *Hallock* case, *supra*, referring to the *Klein* case:[5]

> "The inescapable rationale of this decision, rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."

The Supreme Court has set its face more and more against involvement in the "subtle casuistries" of property law and has looked at the question more as one of "a fair and workable tax system." In two decisions published about the same time as the decision of the Tax Court in the instant case and not mentioned therein, the Supreme Court has given full sweep to the taxing power of Congress and the freest interpretation to Sec. 811 (c) of the Code. In *Commissioner* v. *Field*, 324 U. S. 113, 116, 65 S. Ct. 511, 89 L. Ed. 786, the Court said:

> "The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable."

Again in *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, 111, 112, 65 S. Ct. 508, 89 L. Ed. 782, the Supreme Court said:

> "It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon 'elusive and subtle casuistries.' *Helvering* v. *Hallock*, *supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or

5. See Stone, Justice, Helvering v. St. Louis Trust Co., 296 U. S. 39, 46, where he is speaking of Section 811(c) and (d): "Both provisions prevent tax evasion by subjecting to the death tax, forms of gifts *inter vivos* which may be resorted to, as a substitute for a will, in making dispositions of property operative at death."

> certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries."

In the light of these most recent expressions of the Supreme Court, we think it clear that since there was a possibility that all of the beneficiaries might be dead at the settlor's death, there was a possibility of the trust failing and the property returning to the settlor; that this was such an interest in the property as was not wholly divested by the settlor until his death; that this possibility prevented the full and complete possession and enjoyment of the corpus until the settlor's death, and therefore the corpus was within the provisions of Sec. 811(c) of the Revenue Code, and the Commissioner properly included the entire corpus in the taxable estate of Mr. Spiegel.

Counsel for the taxpayer has relied heavily upon *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410. We do not think this case controlling here because as to the five trusts held nontaxable in that case, the Court said at page 346:

> "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

We hold in the instant case that there was a possibility of the corpus of the trust returning to the settlor because of the precedent condition that the beneficiaries or some of them must survive the settlor, and that the corpus had not completely passed from the settlor.

Emphasis is placed by the taxpayer upon the fact that the settlor did not receive the income from the trust but such income was all given to the beneficiaries. That fact may be important in determining whether that segment of the property passed by the trust, but it is not controlling or persuasive as to whether the settlor had completely disposed of the corpus.

The decision of this court in *Commissioner* v. *Lasker*, 141 F. 2d 889, also relied upon by the taxpayer, if still authority in the light of the recent liberal opinions of the Supreme Court, can be distinguished from the instant case

in this respect—there the possibility of reverter was so remote as to be practically non-existent.

It is suggested by the taxpayer that the ruling of the Tax Court that the decedent retained no interest in the property is conclusive. We think the question presented here is a pure question of law, and that the action of the Tax Court being in our opinion erroneous in law is reviewable by us. *Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248.

For such error of law, the judgment of the Tax Court is

REVERSED.

Endorsed: Filed December 28, 1946. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-eighth day of December, 1946, the following further proceedings were had and entered of record, to-wit:

Saturday, December 28, 1946.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner*, vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents*	Petition for Review of Decision of The Tax Court of the United States.
No. 8932	

This cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the Decision of The Tax Court of the United States entered in this cause on April 3, 1945, be, and the same is hereby, reversed.

And afterwards, to-wit: On the eleventh day of January, 1947, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition for Rehearing is in the words and figures following, to-wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8932

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* *vs.* ESTATE OF SIDNEY M. SPIEGEL, DECEASED, et al., etc., *Respondents.*	Petition for Review of Decision of the Tax Court of the United States.

PETITION OF RESPONDENTS FOR REHEARING.

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IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8932

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. ESTATE OF SIDNEY M. SPIEGEL, DECEASED, et al., etc., *Respondents.*	Petition for Review of Decision of the Tax Court of the United States.

PETITION OF RESPONDENTS FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come Respondents, by Herbert A. Friedlich, Harry Thom and Louis A. Kohn, their attorneys, and file this Petition for a Rehearing in the above entitled cause, and pray that a rehearing may be granted for the following reasons:

1. The Court erred in holding that there should be included in the taxable gross estate of Sidney M. Spiegel, deceased, property in which the decedent had no interest whatsoever at the date of his death.

2. The Court erred in holding that Spiegel had a possibility of reverter in the trust property by operation of law whereas, under applicable and governing Illinois decisions, it was impossible for the property to revert to him.

Introductory Statement.

The Court found that the remainders in the case at bar were contingent, and that, therefore, if the settlor had survived all beneficiaries, the trust would have failed and the property would revert to the settlor by operation of law. In determining that the remainders were contingent, the Court disregarded the well settled and governing Illinois law, *as well as the admission of the Government*, that the remainders were vested. As the remainders were vested, the trust could not fail, and the property could not revert to the settlor, under any condition.

The Spiegel remainders vested in interest at the inception of the trust in 1920. This cannot be questioned under the Illinois decisions and the Government cited no authorities whatsoever on this point. If, however, the Court had any doubt, it should have been entirely dissipated by the express admission of the Government, at the oral argument, that the remainders were vested.[1]

The Court, nevertheless, refused to follow Illinois decisions as to vested remainders under testamentary trusts, cited by Respondents, because, in its opinion, decisions involving testamentary trusts are not applicable to *inter vivos* trusts. The Court refused to follow the cited authorities, although there can be no question in Illinois that rules of construction with respect to vesting of testamentary remainders are equally applicable in determin-

1. It is submitted that, in any event, the Court should modify its opinion, heretofore rendered, so as to state therein that the Government made the aforesaid admission in order that the record, which may go to the Supreme Court upon application for a *writ of certiorari*, will disclose such admission.

ing the vesting of *inter vivos* remainders. In fairness to the Court, however, it should be stated that no cases on the precise point were cited in Respondents' original Brief.

Having discarded all of the Illinois authorities on vesting, cited by Respondents (and the Government cited none), because of the Court's erroneous conclusion that they are not applicable to *inter vivos* trusts, the Court, further (unintentionally, we assume) ignored the unequivocal admission of the Government that the remainders were vested.

A determination as to whether the settlor retained any interest in the trust property is governed by the property laws of Illinois and, under those laws, requires a further determination whether the remainders were vested or contingent. As there was no express provision for any reverter to Spiegel, the property could not possibly have come back to him under the terms of the trust. If the remainders were (and they clearly were) vested, the trust could not fail. There can be no failure of a trust containing a vested remainder because, by definition, there will always be a beneficiary (or the heirs or legatees of a beneficiary or the State upon escheat) ready to take possession of a vested remainder, whenever and however the preceding estate terminates. Accordingly, the trust property could not have reverted to the settlor by operation of law on the theory that there might have been no one else to take.

We submit that, upon a re-examination of the cited authorities, together with the additional authorities cited in this Petition for Rehearing, the Court should conclude that the remainders were vested, and that, accordingly, Spiegel, the decedent, did not have, and could not possibly have had, any interest in the trust property at the date of

his death, and therefore that his estate is not liable for estate taxes on account of such trust property.[2]

In view of the unwarranted construction placed upon the instrument in question by the Court, with the resulting large tax liability,[3] we feel that, in the interests of justice, we owe it not only to the client, but also to the Court, to discuss fully the fundamental rules of law involved and to point out the Court's misapprehension of the nature of the interests created. We, therefore, beg the Court's indulgence in considering this lengthy Petition.

Detailed Statement of the Grounds and Reasons for Rehearing.

Respondents submit that it is clear that, under the law of Illinois, the trust instrument (set out in footnote 2 to the Court's opinion) absolutely divested the settlor-decedent of any possible interest in the trust estate from and after the creation of the trust in 1920, and that, even if all of the three named children of the settlor had died prior to the death of the settlor, leaving no descendants them surviving, the settlor could not have taken any interest in the trust property by operation of law or other-

2. In *Central Hanover Bank and Trust Company* v. *U. S.*, 57 F. Supp. 497 (1944), the Court of Claims, in a similar situation involving an *inter vivos* trust, assumed that, if the children of the settlor-decedent died without issue before the settlor's death, the trust would fail and the property would revert to the settlor and, therefore, held the trust property includable as part of the settlor's gross estate. On taxpayer's motion for a new trial (58 F. Supp. 565 (1945)), the court considered New York decisions to the effect that the trust property "would have vested absolutely in the last surviving 'remainderman' even if he had died before the settlor, or that it would have been divided equally between the estates of the three remaindermen even if all had predeceased the settlor". The court clearly indicated that, if the New York law was to the above effect, it would have excluded the value of the remainders from the decedent's gross estate. The Court granted a new trial and held for the taxpayer, even though there might be doubt as to the New York law, inasmuch as the decedent undoubtedly considered the law to be as above stated and, therefore, did not intend to retain any interest in the trust property.

3. The principal amount involved, together with interest thereon, is in excess of $500,000.

wise. The trust property would have passed, in such event, under the wills or as intestate property, of the three named children of the settlor, and its transfer would, in such event, have been subject to payment of estate taxes by the estates of the settlor's children. If the settlor acquired any of the trust property, it could have been only as a legatee or as the next of kin of one of his children and not by reason of any failure to divest himself of all of the property included in the trust.

Under the law of Illinois, the remainders, given to the three named children, were vested remainders from the inception of the trust in 1920, subject, however, to subsequent divestment by executory limitations over, if, and only if, the contingencies provided in the trust occurred. The divestment, expressly provided for in the trust, was in favor of children of a deceased named child of the settlor, of other named children of the settlor, or of descendants of other named children of the settlor, and could only operate in the event that a child of a deceased named child, another named child or a descendant of one of the named children was alive upon the death of the settlor. The settlor was given no right of reverter by the terms of the instrument.

If none of the specified persons, in whose favor the condition subsequent ran, were alive at the settlor's death, then there would be no divestment and the respective vested remainders in the three named children would pass under their wills or as their intestate property. This would unquestionably have been the effect of the application of the laws of Illinois to the trust before the Court with the result that the controlling Illinois law would not operate to bring about the reverter of any interest in the property to the settlor under any condition.

Since the settlor had no interest whatsoever in the trust

property after 1920, his estate could not be taxable on account of the property.

I.

The Remainders to the Three Named Children of the Settlor Were Vested Remainders Under Illinois Law.

The applicable Illinois decisions, of which *Lachenmyer v. Gehlbach*, 266 Ill. 11, is typical, as well as other authorities demonstrating that the remainders in question were vested from the date the trust was established, are set out on pages 11 through 15 of Respondents' Brief.

Government Admits Remainders Were Vested.

The Illinois authorities, to the effect that these remainders were vested, are so clear that counsel for the Government cited no authorities on the point and, at the oral argument before this Court, unequivocally admitted that the remainders were vested. The Court has either overlooked or disregarded this admission.

Authorities Respecting Vested Remainders Under Wills Are Controlling Authorities With Respect to Remainders Under Inter Vivos Trusts.

The Court, in its opinion, comments upon the Illinois authorities, cited by Respondents with respect to vesting, as follows (p. 3):

> "To support this proposition the respondent taxpayer cites certain Illinois cases. These are cases involving property which was disposed of by will. In such cases the rights of the parties vest and are fixed at the death of the testator. There can be no divesting of such rights except as provided in the will. We think it could not be disputed that if there were

> no takers under a will at the time of the testator's death, the property would be intestate property. * * *"

Thus, this Court declines to hold the remainders vested, on the ground that the authorities cited by Respondents involved wills. However, authorities with respect to vesting of remainders under trusts created by will are clearly relevant with respect to vesting of remainders under *inter vivos* trusts. This is evident from a study of the opinion in *Klein* v. *United States*, 283 U. S. 231, where the Supreme Court supports its finding that the remainder, there involved, was contingent by citing Illinois cases. Each of the cases so cited (283 U. S. at p. 234) is a case involving a testamentary trust, whereas the *Klein* case dealt with an *inter vivos* conveyance.

Illinois courts have conclusively rejected the contention that authorities with respect to vesting of remainders in connection with testamentary trusts are not binding on the question of vesting of remainders under *inter vivos* instruments. In *Harder* v. *Matthews*, 309 Ill. 548 (1923), the court had occasion to determine whether a remainder, set up by an *inter vivos* deed, was vested or contingent and stated that the Illinois rule as to vested remainders was laid down in *Lachenmyer* v. *Gehlbach*, 266 Ill. 11, cited on page 11 *et seq.* of Respondents' Brief. As the *Lachenmyer* decision involved a trust under a will, it was argued that the *Lachenmyer* decision was not applicable to a remainder created by *inter vivos* indenture. The court held to the contrary, saying (p. 566):

> "The question usually arises in the construction of wills, because executory devises are more common than executory limitations in deeds. All the cases which have been cited are cases of wills, but in *Ames* v. *Smith*, 284 Ill. 63, the limitation was contained in a deed reserving a life estate to the grantor, conveying the remainder in fee simple to the grantor's sons,

with an alternative gift over in case of the death of either of the sons without a child or wife surviving him, or leaving a wife or child surviving, or a wife and child or children. The grantor having died and the sons survived, the rule in regard to the gift over of a future interest to take effect upon the termination of a particular estate announced in *Lachenmyer v. Gehlbach, supra,* was quoted and followed and the sons were held to be vested with the title in fee simple. * * *

(p. 568) "It is said that in this case the rule in question, which was formulated to aid in the construction of wills, is sought to be applied to a deed. As has been said already, the necessity for construction of the language in question arises more frequently in cases of wills, *but the rule is as applicable to the comparatively few cases involving a deed as to those of wills.* It was applied in *Ames* v. *Smith, supra,* to a deed, and its application in the case of a deed was recognized in *Cutler* v. *Garber, supra,* though that case was held to be excluded from its operation by the language of the deed there involved, which clearly referred the contingency to a time later than the expiration of the particular estate." (Italics ours.)

In *Smith* v. *Dugger,* 310 Ill. 624 (1924), the court again considered an *inter vivos* deed and said (p. 626):

"In this case the remainder conveyed to the grantor's three sons vested in interest but not in possession, for it was preceded by a life estate in the grantor and falls within the rule announced in *Lachenmyer v. Gehlback,* 266 Ill. 11 * * *. That rule has been approved in numerous subsequent decisions. On this question this case cannot be distinguished from *Harder* v. *Matthews,* 309 Ill. 548, where the rule above quoted was discussed and all the cases referred to in which that rule was involved. The *Harder case* was a conveyance by deed reserving a life estate to the grantor of a fee to the grantee, with limitation over that if she died without leaving a child or descendant of a child the land was to go to the grantor's living grand-

children. * * * There is no language in the deed to take this case out of the rule of construction sustained in the *Harder case* and the cases cited in the opinion, and *it was held in that case the rule applies to a conveyance by deed the same as to a devise by will.* * * *" (Italics ours.)

See, *Hamlyn* v. *Hamlyn*, 7 N. E. (2d) 644, 646 (App. Ct. Ind., 1937) and *Belvin's Executor* v. *Belvin*, 189 S. E. 315, 318 (Va., 1937) to the same effect.

The English rule is the same. In *In re Friend's Settlement* (*Cole* v. *Allcot*), [1906] 1 Ch. 47, the court, in rejecting the contention that rules of construction of testamentary trusts are different from those applicable to *inter vivos* trusts, said (p. 52):

"This question arises on the construction of a deed, but *the authorities shew conclusively that the same principles apply in construing a deed and in construing a will.* * * * [Then quoting Lord Broughan in *Cole* v. *Sewell*, 2 H. L. C. 186, 236] 'My Lords, *there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of saying that we are not to construe a settlement or any other instrument inter vivos in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases;* in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in the case of a settlement.' *In the present case, therefore, I regard this point in exactly the same way as I should were I construing a will.*" (Italics ours.)

Illinois Law Governs.

In the determination of Federal tax liability, the question as to whether remainders under a trust, created by a resident of Illinois, with trustees who are Illinois residents, and executed and delivered in Illinois, are vested,

must, of course, be decided in accordance with Illinois law. Thus in *Blair* v. *Commissioner*, 300 U. S. 5, the Supreme Court said (p. 9):

> "The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, *the nature and extent of the interest of the beneficiary*, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. *Spindle* v. *Shreve*, 111 U. S. 542, 547, 548; *Uterhart* v. *United States*, 240 U. S. 598, 603; *Poe* v. *Seaborn*, 282 U. S. 101, 110; *Freuler* v. *Helvering*, *supra*, p. 45." (Italics ours.)

This court has, likewise, recognized that questions of Illinois property rights must be determined in accordance with Illinois law. See, *Carter Oil Co.* v. *McQuigg*, 112 F. (2d) 275, 279 (C. C. A. 7th, 1940).

The Remainders Vested in Interest in 1920.

The Spiegel remainders became vested in interest immediately upon the execution and delivery of the trust instrument in 1920, even though they could not vest in possession until the death of the settlor.

It must be kept in mind that the term "vesting", with reference to remainders, has two different meanings, namely, (i) vesting in interest, which can be either at or after the creation of a trust and (ii) vesting in possession, which must always be after the trust is set up since, by definition, a remainder comes into the remainderman's possession only upon termination of a prior estate. Thus, in *Hickox* v. *Klaholt*, 291 Ill. 544 (1920), the court said (p. 548):

> "It has uniformly been held by this court that when

ever there is one in being capable of taking the remainder at the termination of a life estate, the remainder is *vested in interest* although it must wait the termination of the life estate before it can *vest in possession.* (*Voris* v. *Sloan*, 68 Ill. 588; *Butler* v. *Huestis*, id. 594; *Frazer* v. *Supervisors of Peoria County*, 74 id. 282; *Lehndorf* v. *Cope*, 122 id. 317; *Welliver* v. *Jones*, 166 id. 80; *Moore* v. *Reddel*, 259 id. 36.)" (Italics ours.)

This Court has recognized that vested remainders vest in interest upon the effective date of the instrument creating them although possession of the trust property may not be taken until some subsequent date. In an income tax case, *Molter* v. *Commissioner*, 69 F. (2d) 7, (C. C. A. 7th, 1934), this Court held that certain Illinois remainders were vested, stating (p. 9):

> "The Commissioner asserted deficiencies upon the theory that petitioner took a vested remainder in her father's estate, and based the gain upon the value of the property on the date of her father's death. The Board of Tax Appeals subsequently upheld the deficiencies as asserted by the Commissioner. • • •
>
> "It is obvious that a remainder without condition precedent can not take effect in possession and enjoyment until the death of the life tenant, or other determination of a particular estate, but that *it does take effect in interest and right immediately on the death of the testator* is a rule which, so far as we know, is not denied in American jurisprudence and is strictly followed in Illinois. *Scofield* v. *Olcott*, 120 Ill. 362, 11 N. E. 351; *Ducker* v. *Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135. • • •." (Italics ours.)

See also, *Hopkins* v. *Commissioner*, 69 F. (2d) 11, 12 (C. C. A. 7th, 1934) (*Certiorari* denied 293 U. S. 560).

The mere fact that possession of the property cannot be obtained by the remaindermen until the death of the settlor does not make the remainders taxable as property of

the settlor-decedent. Estate Tax Regulations 105 provide (in Section 81.17 with reference to transfers intended to take effect in possession or enjoyment at or after death) that the value of property, transferred by *inter vivos* trust, is not to be included in the gross estate of the settlor-decedent unless *both*

> "(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, *and*
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)."

The settlor in the Spiegel trust possessed no right or interest in the property, either by the express terms of the trust instrument or otherwise, as we shall show hereinafter.

A Will Speaks From Date of Death. An Inter Vivos Trust Speaks From Its Delivery. A Testamentary Remainder Cannot Vest Before the Settlor's Death. An Inter Vivos Remainder May Vest Upon Delivery of the Trust.

In its opinion the Court says (p. 3):

> "To have a case analogous to the possible case under the instant trust, you would have to have a situation where all takers were dead at the testator's death. • • • We do not think that on the execution of the trust there was such vesting of the interests of the beneficiaries as there would be in the case of a will, which takes effect only as of the death of the testator."

As a will is an ambulatory instrument and speaks only from the death of the testator, vested remainders under testamentary trusts can not vest prior to the date of death of the testator; the date of death is the first moment at which they can vest. An *inter vivos* trust, however, takes

effect from the date of its delivery, and remainders thereunder may vest at that time. Under Illinois law, the remainders under the Spiegel trust vested immediately upon creation of the trust.

We submit that a testamentary trust, all beneficiaries of which are dead at the date of death of the testator, would not be analogous to the instant situation where all named beneficiaries were alive and took vested interests at the trust's inception in 1920, subject to being divested under a certain specified condition subsequent and under such condition only. The interests of the beneficiaries under the Spiegel trust, having vested upon the delivery of the trust, are analogous to interests of beneficiaries under a testamentary trust, who *survive* the testator and take vested remainders upon his death. If all of the named beneficiaries, designated under the Spiegel trust, had died after the trust had been set up and before the settlor's death, their situation would be like that of beneficiaries, who take vested remainders under a testamentary trust at the death of the testator but die prior to the termination of a preceding life estate.

No *inter vivos* trust would, as a practical matter, be set up for the benefit of remaindermen who are dead at the inception of the trust. A testamentary trust, however, may name beneficiaries who are dead at the death of the settlor; this can happen since a will is drawn before death to speak, not as of the date of its execution as in the case of an *inter vivos* trust, but as of the date of death of the testator who cannot know which beneficiaries will be alive when he dies.

The Klein Case Is Not Applicable.

Notwithstanding the Illinois decisions and the Government's admission, this Court in its opinion held (p. 4):

> "* * * that the interests under this trust did not vest upon the execution of the trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the beneficiaries or some of them survive the settlor. * * *"

This portion of the Court's opinion appears to be based partly upon *Klein v. United States*, 283 U. S. 231, 233, 234, and partly upon this Court's erroneous conclusion, hereinbefore discussed, that the authorities, cited by Respondents in their Brief, involved trusts created under wills and not *inter vivos* and were therefore inapplicable.

The remainder to Klein's wife, which was the subject of the *Klein* case, was clearly a contingent remainder if it was, in fact, a remainder at all, which is doubtful. The Supreme Court there said (p. 233):

> "* * * The life estate is granted with an express reservation of the fee, which is to 'remain vested in said grantor' in the event that the grantee 'shall die prior to the decease of said grantor'. * * * It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore was contingent. * * * The decisions of the Supreme Court of Illinois, the state where the deed was made and the property lies, support this conclusion. * * *"

A comparison of the Klein deed with the Spiegel trust makes it apparent that (1) the Klein "remainder" was *retained* by Klein, while the Spiegel remainders were

conveyed by the settlor, and (ii) the rights of Klein's wife came into being only if a condition *precedent* occurred to take the property away from Klein, whereas the Spiegel children immediately took interests which could only be divested by a condition *subsequent* which could not possibly operate in Spiegel's favor. There was no conveyance of any interest to Klein's wife at the time of delivery of the deed except a conditional right to take the remainder in the event that she survived her husband. Immediately prior to Klein's death, he held the "remainder" interest, which could not vest (either in interest or possession) in his wife except at his death. At best, the interest of the wife, upon the delivery of the conveyance, was a contingent remainder. In the case at bar, however, the remainders to the three named children vested, under Illinois authorities, immediately upon the delivery of the trust.[4]

It seems indisputable that the remainder interests of the three named children of the settlor, Spiegel, were vested remainders. The Government has admitted that they were vested remainders. Yet this Court's opinion finds that those remainders were contingent.

As the remainders vested in 1920 and could not be divested, under any conditions, in favor of the settlor, the settlor, after 1920, has no reverter or other interest in the trust property.

4. The instant trust, after gifts of income during settlor's life, provided that

> "Upon my death, the said Trustees * * * shall divide the said trust fund * * * equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled. * * *".

and made other provision for divesting the remainders in case there were no children of deceased children then living.

II.

A Vested Remainder Passes, Upon the Death of the Remainderman, Either Under His Will or as His Intestate Property and Does Not Revert to the Settlor or Grantor.

The court, in its opinion, states that (p. 4):

> "If none of the beneficiaries survived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare naked title to the corpus as resulting trustees for the settlor. *Restatement of the Law of Trusts*, Sec. 411(b); *Bogert, The Law of Trusts and Trustees*, Vol. II, Sec. 468; *Lill v. Brant*, 6 Ill. App. 366, 376."

We submit that this statement of the law is not correct as applied to the case at bar. As the remainders in the instant case were vested, the trust could not have failed even if all the beneficiaries had predeceased the settlor.

A vested remainder, by definition, is a present property right which stands ready at all times to take effect in possession whenever and however the preceding right comes to an end. If the named remaindermen are not in existence when the preceding estate terminates, their heirs, next of kin, legatees, or devisees take. If such persons are not able to take, the remainder escheats to the State. That the remainders, though vested, may be subsequently divested does not alter this result. See, *Kales*, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d Ed., Secs. 93, 94, 327; Gray, The Rule Against Perpetuities, 4th Ed., Sec. 101. In no event can property conveyed as a vested remainder revert to the settlor in the absence of an express provision to that effect.

This fundamental rule of law is applicable to the situation, referred to in the opinion of this Court, which would have existed had all the named beneficiaries predeceased

Spiegel. Moreover, this statement of the law is supported by the same section of the Restatement of the Law of Trusts which the Court has cited.[5] Thus Comment *i* of § 411 of the Restatement states that, in the case of a vested remainder in trust, if the beneficiary dies intestate without heirs or next of kin, the property passes to the State. On the other hand, the Restatement says, in § 411 (*l*), that: "If, however, the interest of the beneficiary in remainder is contingent, and he dies intestate without heir or next of kin before it is vested, a resulting trust arises in favor of the settlor or his estate." § 411 (b) of the Restatement, cited by the Court, merely states that if a trust fails a resulting trust arises; it does not discuss the conditions under which a trust will fail.

Upon the death of a named child of the settlor, Spiegel, prior to the death of the settlor, his vested remainder under the trust would pass under the will of the deceased named child or descend to his next of kin as intestate property. While it is true that the vested interest would, prior to the termination of the preceding estate, be subject to divestment if the exact divesting conditions subsequent should occur, it would, nevertheless, remain a vested interest in the original remainderman's legatees or next of kin until so divested. The interest could not pass to the settlor in the absence of an express provision in the trust instrument to that effect. See discussion and authorities under Point III, *infra*.

In *Smith* v. *West*, 103 Ill. 332 (1882), Allan delivered a deed to Mrs. West under which it was claimed that re-

5. The other authorities cited in this portion of the opinion are not in point. Bogert, The Law of Trusts and Trustees, Vol. II, Sec. 468, states what happens when a trust fails, but as shown above, the Spiegel trust could not fail. *Lill* v. *Brant*, 6 Ill. App. 366, 376 (reversed, 98 Ill. 608), merely covers the situation where surplus property remains after completion of the purposes of a limited and special trust set up to protect a creditor. The Spiegel trust has no such limited or special purposes.

remaindermen, following a life estate granted to Mrs. West, took only contingent interests. The court held that the remainders were vested, saying (p. 337):

"It is urged that Allan's deed to Mrs. West only having conveyed a life estate to her, and a remainder to the children of her body, or such as might be living at her death, or the descendants of any one that might be then deceased, the fee remained in him or his heirs until her death, and the fee would not vest in the remainder-man until the life estate should be expended, and hence the remainder was contingent. We do not so understand the rule. We understand it, that when a conveyance of the particular estate is made to support a remainder over, the tenant for the particular estate takes it, and if the remainder-man is in being, he takes the fee. *In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise.*

• • •

(p. 339) "In this case, under all of the conditions of the rule, the remainder passed from and vested in the children of Mrs. West. They were then in being, were ascertained and designated as the remainder-men, and were capable of, and did take, a vested remainder, and as has been seen, *their death before their mother, without issue, would not prevent or defeat the vested remainder,—it would in such a case descend to their heirs.* But whatever may become of the estate in the future, we have no doubt it vested in the children of Mrs. West when the deed was delivered. *It then follows that Allan had parted with all of his title by conveying the land, and was not incompetent as a witness, because he held no title to or an interest in the land.*" (Italics ours.)

In *Baley* v. *Strahan*, 314 Ill. 213 (1924), cited in *Klein* v. *United States*, 283 U.S. 231, 234, Strahan willed a

life estate to his wife with remainder to his daughter Margaret, but if Margaret predeceased the wife, the remainder was to go to John, a son of the testator. As to alienability of Margaret's remainder during the lifetime of the wife, the court said (p. 215):

"The question at issue is whether Margaret E. Strahan had any alienable interest in the property at the time of her conveyance to her brother John H. Strahan. Appellant contends that by the will Margaret E. Strahan took only a contingent remainder, while the appellee John H. Strahan insists that the remainder was vested, the possession only being postponed, and that Margaret E. Strahan's interest was subject to divestiture in the event that she died before her mother.

(p. 218) "* * * The widow was the life tenant. Her death was certain to occur; the time of her death, only, was uncertain. Margaret, the person to whom the remainder was devised, was ascertained. She survived the widow and the life estate terminated. *Had her death occurred prior to the termination of the particular estate it would not have made the remainder contingent.* It is not the uncertainty of the actual enjoyment of the estate which renders a remainder contingent; it is the uncertainty of the right to the estate which makes it so. * * *

(p. 219) "*The remainder was not devised to Margaret upon the contingency that she survive her mother, but on the theory that her death before that of her mother constituted a condition subsequent, on the happening of which the estate already vested in her was to be divested* and pass to and become the property of her brother John. * * *

(p. 220) "Here *the interest vested in Margaret could be conveyed*, while if there were only a contingent interest there would be nothing alienable. *Kenwood Trust Co.* v. *Palmer*, 285 Ill. 552; *Friedman* v. *Friedman*, 283 id. 383; *DuBois* v. *Judy*, 291 id. 340." (Italics ours.)

Discussing *Commissioner* v. *Estate of Bayne*, 155 F.

(2d) 475 (C. C. A. 2d, 1946), cited by the Government on p. 18 of its brief, Commerce Clearing House-Federal Estate and Gift Tax Reporter states (para. 3430, p. 1553.3) that:

> "The *Bayne* case indicates that a remainder over to the decedent's next of kin is effective [to obviate a reverter to the settlor]. From this it would seem that provisions for remainders over to 'those who would take if I died intestate' or to my 'heirs-at-law' should also be effective where the remainders are contingent. Provision for remainders over to next of kin of the contingent remaindermen would probably be effective also. *If the remainders are vested, there may be no need for such provisions since then the decedent may receive back the property only by taking as an heir of the remainderman* and under a transfer taxable in the estate of the remainderman. He would not be taking by virtue of a failure of beneficiaries. This subject must be watched closely, however, in view of the zeal with which the Commissioner has been pursuing the problem and the fact that so many of the findings of the courts have been unpredictable." (Italics ours.)

A vested remainder can be alienated during the lifetime of the remainderman, can be transferred by his will, and will descend to his heirs or next of kin as his intestate property. It cannot, however, go back or revert (in the absence of an express provision for such a reverter in the trust instrument) to the settlor of the trust. A settlor could, of course, again become the owner of the vested remainder interest by voluntary conveyance from the remainderman or as a legatee of the remainderman or as an heir of the remainderman. In each such case, however, he would recover the remainder, not by reason of any reverter, "string" or interest retained in the property at the time of the creation of the trust, but through and from the *remainderman* himself.

When Spiegel delivered the instant trust instrument in 1920, he effectively transferred all of his interest in the trust property, and *under no contingency whatsoever* could any interest in the property transferred under the trust have reverted to him.

III.

Under the Law of Illinois a Vested Remainder Subject to Divestment Upon Occurrence of a Condition Subsequent Will Be Divested Only If Events Occur Exactly as Specified. The Vested Remainders Could Never Be Divested in Spiegel's Favor.

Immediately upon the death of a named child of Spiegel (a vested remainderman) before Spiegel's death, such child's vested interest would pass to his next of kin or legatees. See discussion and authorities under Point II, *supra*. Such next of kin or legatees would retain such interest until and unless, upon Spiegel's death, the interest was divested by the occurrence of the exact conditions specified in the divesting condition subsequent.

If a named child of Spiegel had died before Spiegel, then, upon Spiegel's death, the child's vested interest would pursuant to the condition subsequent have passed to his children, if any survived, or, if not, to the other surviving named children (other vested remaindermen), or, if there were no other surviving named children, to the surviving descendants of the other named children. The deceased named child's interest could, under no contingency, revert to or revest in Spiegel.

Assuming, however, that there were no living children of such deceased named child, and no other named children of Spiegel or descendants of such other named chil-

dren, who survived to take possession of the vested remainders upon Spiegel's death, the divesting condition subsequent would not operate as there would be no one living, who could take under the terms of the condition subsequent. In such event, the next of kin or legatees of the named children or (if the interest had escheated upon a named child's death) the State would receive possession of the trust property. See, *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110 (1941) and other authorities cited in Respondents' Brief, pages 15 to 23.

In addition to cases cited in Respondents' Brief, the rule that a condition for divesting a vested remainder will not operate to divest, except where the specified contingency takes place literally, is laid down in *McFarland* v. *McFarland*, 177 Ill. 208 (1898) where the court said (p. 217):

> "When a devise is subject to be divested upon the happening of a certain specified contingency, courts will not accept another contingency as the equivalent of that named by the testator, but will only divest the estate when the contingency takes place literally. *Illinois Land and Loan Co.* v. *Bonner*, 75 Ill. 315."

Again, the Illinois Supreme Court recognized this rule in *Henderson* v. *Harness*, 176 Ill. 302 (1898), where it is said (p. 309):

> "The estate having vested in the first taker under this devise, it cannot be divested except on the contingency happening literally in accordance with the instrument creating the estate of the first taker. Roper on Legacies, 619; *Illinois Land and Loan Co.* v. *Bonner*, 75 Ill. 315."

Thus, under no circumstances would divestment of the remainder interests result in the retention of any interest by settlor in the trust property.

IV.

As Spiegel's Interest in the Trust Property, Before and At His Death, Was Nil, Such Property Can Not Be Included in the Value of His Gross Estate.

It is well settled that Federal estate taxes are imposed upon the transmission of property from a decedent to living persons at the date of death, and are therefore unlike succession taxes which are imposed upon the right of a beneficiary to receive property from a decedent, measured by the value of such property. As stated in *YMCA* v. *Davis*, 264 U. S. 47, with reference to the Federal estate tax (p. 50):

> "* * * What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeed to on death, but the interest which ceased by reason of the death."

See also, *Chase National Bank* v. *U. S.*, 278 U. S. 327, 336; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 347; *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151, 155; *Edwards* v. *Slocum*, 264 U. S. 61, 62; and *Nichols* v. *Coolidge*, 274 U. S. 531, 541.

It follows, therefore, that no tax significance should be attached to the rights of the various beneficiaries named in the trust agreement, as between themselves, upon the death of a settlor or to possible shifting of interests at that time among the group of beneficiaries. As far as Spiegel was concerned, his conveyance was complete and irrevocable in 1920. No interest, therefore, passed from him upon his death and there is nothing upon which an estate tax can be predicated.

No decision of the Federal courts, which has construed the estate tax law, holds that there should be included in a decedent's gross estate for tax purposes (in the absence of a gift in contemplation of death) any property in which he held, at the date of his death, *no* interest or control, or in connection with which he had *no* possibility, at the date of his death, of recovering back any interest.

Helvering v. Hallock and Related Cases Are Not Applicable to the Trust Before the Court.

A great deal of confusion, however, has arisen from statements of the Supreme Court in *Helvering* v. *Hallock*, 309 U. S. 106, and in other cases, to the effect that niceties of conveyancing will not be permitted to relieve a decedent's estate of taxation. The *Hallock* case, as well as the *Klein* case, *supra*, *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, referred to in the *Hallock* case, each involved a trust under which the settlor retained an *express* right to get the trust *res* back under certain conditions.[6]

6. The *Hallock* case involved three different trusts (see *Helvering* v. *Hallock*, 309 U. S. 106, 115):

One trust gave the income to the settlor's wife for life, with this further provision:

"If and when Anne Lamson Hallock shall die then and in such event * * * the within trust shall terminate and said Trustee shall * * * pay Party of the First Part if he then be living any accrued income, then remaining in said trust found and *shall * * * deliver forthwith to Party of the First Part, the principal of the said trust fund.* If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part share and share alike * * *."

The Party of the First Part was the settlor.

A second *Hallock* trust involved an ante-nuptial agreement which conveyed property in trust, the income to be paid to the prospective wife during her life, subject to the following disposition of the principal:

"In trust if the said Rae Spektor shall die during the lifetime of said George F. Uber *to pay over the principal and all accumulated income thereof unto the said George F. Uber in fee* free and clear of any trust.

"In trust if the said Rae Spektor after the marriage shall survive

The *Hallock* opinion held that, in view of the fact that each of the settlors in the *Hallock* trusts, the *Klein* conveyance and the two *St. Louis Trust Co.* trusts, could, by the express provisions of the respective trust, get the property in question back upon the happening of a certain contingency or contingencies, it made no difference whether the right retained by the settlor was a right of reverter, remainder or reversion, or whether the preceding estates were contingent or vested. The settlor, in each of those cases, had *expressly* reserved the right, under certain cir-

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the said George F. Uber to pay over the principal and all accumulated income unto the said Rae Spektor—then Rae Uber—in fee, free and clear of any trust.'"

Uber was the settlor.

A third *Hallock* trust provided for payment of trust income to the wife during her life and, upon her death, to the settlor if he should survive the wife, and continued:

"'Upon the death of the survivor of said Ida Bryant and the party of the first part, unless this trust shall have been modified or revoked as hereinafter provided, *to convey, transfer, and pay over the principal of the trust fund to the executors or administrators of the estate of the party hereto of the first part.*'"

The party of the first part was the settlor.

The remainder in the *Klein* case was created by a deed, the habendum clauses of which were as follows:

"'First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event *remain vested* in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"'Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantor shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.'" (*See Klein* v. *United States*, 283 U. S. 231, 232.)

The trust in the first *St. Louis Trust Co.* case provided that the income of the trust was to be paid to the settlor's daughter during her life, but at her death "*if the grantor still be living, the trustee shall forthwith * * * transfer, pay and deliver the entire estate to the grantor, to be his absolutely.*" But "if the grantor be then not living" then the income was to be paid to the settlor's wife if she were living, and upon the death of both daughter and wife, if the settlor were not living, the trust property was to go to the daughter's children, or if she left none, to the grantor's next of kin (*See Helvering* v. *Hallock*, 309 U. S. 106, 112-113).

In the second *St. Louis Trust Co.* case, the income of the trust was to be accumulated or paid over to the daughter of the settlor during her life. The instrument further provided that "*if the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely*, or * * * if I should die before her death, then this property shall thereupon become hers immediately and absolutely * * *." (*See Helvering* v. *Hallock*, 309 U. S. 106, 113.)

cumstances, to get the property back and the reservation was held sufficient to require inclusion of the trust property in the gross taxable estate of the decedent-settlor, regardless of the nature, character or name of the reservation.

Commissioner v. *Estate of Field*, 324 U. S. 113, cited by this Court in its opinion, likewise involved a trust under the express provisions of which the settlor was to receive income for life and, if two nieces predeceased him, the corpus was to be distributed to the settlor. Further, if he died prior to the death of the two nieces, leaving issue, the corpus was to be held in trust for his widow and his children or their issue, subject to the right of the settlor to reduce or cancel the amount by will or written instrument. The Supreme Court said (p. 116):

> "Thus, until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent."

In *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, the trust agreement also expressly provided for the payment of income to the settlor for life, and that, upon her death, the property was to go to her daughters and their descendants, but that, if both daughters died without leaving descendants who survive the settlor, the corpus would be paid over to such persons as the settlor might appoint by will, and, in default thereof, to certain named charities. The court said (p. 111):

> "The ultimate disposition of all the trust property was suspended during the life of the decedent. Only at or after her death was it certain *whether the property would be distributed under a power of appointment as provided in the trust instrument*. The life estates of the daughters were contingent upon their surviving their mother and took effect in enjoyment only at the death of the latter. * * * Thus until the

moment of her death or until an undetermined time thereafter, *the decedent held a string or contingent power of appointment over the total corpus of the trust.*"

In the instant case, Spiegel retained no express right to have the trust property distributed to him, as in the *Hallock* and *Field* cases, nor any right to reduce or cancel amounts which beneficiaries could take, as in the *Field* case, nor any power of appointment over the corpus of the trust, as in the *Fidelity-Philadelphia Trust Co.* case.

The Supreme Court decisions all deal with instances where the settlor of a trust retains, under the *express provisions* of the trust, a right either to get the property back or to control its devolution by exercise of a power of appointment. In those instances of express provision for reverter or control, the Supreme Court has said categorically that it is not interested in what name is given to the rights retained by the settlor or whether the estates of beneficiaries are vested or contingent. Regardless of the technical rules of conveyancing and the name given his interest, the settlor, in those cases, could by express provision of the trust either have gotten the property back or controlled its passage and that was held sufficient to make it taxable to his estate.

Subsequent to the *Hallock* decision, cases arose in which settlors of trusts retained no express right ever to get the trust property back or to control it. In dealing with those cases, the Federal Courts have, in several decisions, held that, even though there is no express right of reverter retained, nevertheless, if the applicable law operates to give the settlor a right of reverter under certain conditions, the property, which may possibly be subject to such right of reverter, will be included in the gross estate of the settlor-decedent. The right of a settlor to receive back trust property under rules of law, upon the occurrence of certain

events, has been termed "a possibility of reverter by operation of law".

However, a "reverter by operation of law" means exactly what it says. It means that the settlor has a right, under certain conditions, to have the trust property revert to him by operation of local property law upon the trust. Such a right, if it existed, would, upon the conditions occurring, entitle the settlor to compel the trustee to turn over the trust property to the settlor and, if the property were not voluntarily so turned over, to require the trustee to transfer the trust property to the settlor through court proceedings. However whether the settlor has such a right to receive back the trust *res*, and to enforce such right in a court, must be determined by local law—in this case Illinois law.

In view of the fact that Spiegel, in 1920, gave his three named children vested remainders in the trust property, subject to divestment only upon the specific conditions subsequent set out in the trust agreement, and did not make any provision for the return of the property to himself under any conditions, then, under the settled Illinois law, Spiegel could never receive the property back. If all the named children had died, and all of their children and descendants had likewise died, prior to the death of Spiegel; Spiegel would still have acquired *no* interest in the remainders. Such remainders, having vested upon the creation of the trust, would, upon the death of the named children prior to Spiegel's death, have passed under the will, or descended as intestate property, of the three named children of the settlor. See discussion and authorities under Points II and III, *supra*. As the court said in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 346:

> "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

Thus, the instant case presents a situation (a) where the settlor retained no *express* right to recover back the trust property and, further (b) where, under the law of Illinois, he could not possibly recover the property back. The case at bar presents a case of *impossibility* of reverter by operation of law, *not* a case of possibility of such reverter.

Since Spiegel had no rights in the trust property at the date of his death, and at the date of his death there was no "string" attached to that property which, under any conceivable circumstances, could pull the property back to Spiegel, there was no property interest growing out of the trust which could be included in his gross estate for estate tax purposes.

V.

A Decision by This Court That the Trust Property Is Not Includable in Spiegel's Gross Estate Will Not Affect Uniformity of Administration of the Estate Tax Laws.

The Court in its opinion states that (p. 5):

> "It must always be remembered that we are dealing with a tax law that Congress intended should be uniform in its application, and that the provision we are dealing with was one to be used to close the escape mechanism of gifts *inter vivos* when the same transfer of property if made by will would be taxable. Congress did not intend that the tax liability should depend upon the name given to the piece of paper."

There is no provision of law, and no policy, which prevents the making of an outright gift *inter vivos*, thereby relieving the donor of estate tax liability. The provisions of the gift tax law cover such a gift. There is likewise no law or policy against a gift in trust of all interest in property. See, *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 347. The gift tax law covers that type of gift.

If, however, a gift is made in trust and the settlor expressly reserves a right to get back the trust property under certain conditions, then, under the *Hallock* decision, the trust property will uniformly be included in the gross estate of the settlor regardless of "the niceties of the law of conveyancing."

Further, if it is the law that, in instances where a gift in trust is made and a possibility of reverter by operation of local property law exists, the trust property will be included in the settlor-decedent's gross estate, then, in every case of a trust which does not contain any express right of reverter but in connection with which the local applicable property law will enforce a right of reverter in favor of the settlor, the trust property, subject to such possibility, will, likewise, uniformly be included in the gross estate of the settlor for estate tax purposes.

However, a possibility of reverter by operation of law does not exist in connection with every trust which does not expressly provide for a reverter. Each trust, which does not contain an express provision for reverter, must be examined and the possibility or impossibility of reverter by operation of law determined in the light of the local property law. It therefore follows that all trusts, which do not contain an express right of reverter, will not uniformly, and cannot properly, be held to provide a possibility of reverter by operation of law. This, however, does not affect the uniformity of administration of the estate tax law. Even though the estate tax law may uniformly include in gross estate all property with respect to which a possibility of reverter by operation of law does, in fact, exist, it cannot, we submit, be seriously contended that uniformity requires the inclusion in the gross estate of the settlor of all trust property, even though he has no right, under any circumstances, to get the property back.

Where there is no *express* right of reverter, the ques-

tion as to whether estates in remainder, created by a trust, are vested or contingent becomes of great importance. The determination of the character of the remainder may very well, as is the case of Illinois trusts, determine whether or not the settlor can, under any circumstances, obtain the property back by operation of Illinois law. If he cannot, then he has retained no "string" on the property and his estate cannot be held liable for estate taxes in connection therewith.

VI.

The Court Did Not Give Proper Weight to the Decision of the Tax Court.

This Court refused to follow the decision of the Tax Court in the instant case and said in its opinion (p. 6):

> "In two decisions published about the same time as the decision of the Tax Court in the instant case and not mentioned therein, the Supreme Court has given full sweep to the taxing power of Congress and the freest interpretation to Section 811(c) of the Code."

This Court was referring to *Commissioner v. Field*, 324 U. S. 113, and *Fidelity-Philadelphia Co. v. Rothensies*, 324 U. S. 108.

The Tax Court has not overlooked these cases. As recently as December 16, 1946, the Tax Court in *Estate of Edward P. Hughes*; 7 T. C., No. 157, C. C. H. Decision No. 15,510, considered these decisions and adhered to its earlier rulings to the effect that the estate tax does not require inclusion of trust property in a decedent's estate where there is no express provision for the property coming back to the settlor and only a remote chance of reverter by operation of law. In the *Hughes* case it was assumed that there was a remote right of reverter by operation of law,

7. See Respondent's Brief, p. 38, *et seq.*

and the taxpayer did not deny such possibility. In the instant case, of course, there is no possibility, remote or otherwise, of the trust property reverting to the settlor.

In the instant case (R. 129), the Tax Court held that:

> "The decedent in creating the trust retained no 'string or tie' amounting to a possibility of reverter, and hence the doctrine of *Helvering* v. *Hallock*, 309 U. S. 106, and numerous decisions deriving from it, are not in point."

Assuming that the decision of the Tax Court in the case at bar involved purely a question of law, nevertheless this Court should give serious consideration and great weight to the Tax Court's decision that the settlor, Spiegel, retained no interest whatsoever in the trust property, and that the *Hallock* and related cases are not applicable.

As stated by Mr. Justice Jackson, in *Dobson* v. *Commissioner*, 320 U. S. 489, 502:

> "* * * In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible."

In *Brooklyn National Corporation* v. *Commissioner*, 157 F. (2d) 450 (C. C. A. 2nd, 1946), cited on page 52 of Respondents' Brief, the Court, affirming a decision of the Tax Court directly contrary to an opinion of the Second Circuit on the same point, said (p. 452):

> "* * * our power to review a ruling of the Tax Court is very much more limited than in the case of a District Court. * * * As we understand it, before we

may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; *but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges; reasonable differences in legal opinion we are to resolve in its favor.* We have recently discussed the matter in *Kirschenbaum v. Commissioner*, 155 F. 2d 23, and have now nothing to add to what we said." (Italics ours.)

To the same effect, see *Paul*, Dobson v. Commissioner: The Strange Ways of Law and Fact, 57 Harv. L. Rev. 752, 778-9 (1944).

Conclusion.

Since, under the controlling Illinois law, Spiegel retained no interest whatsoever in the trust property, and no possibility of any interest therein, his estate should not be taxed merely because, if the trust instrument had been drawn in different terms, he might have had a reverter interest by operation of law.

We submit with confidence that, when this Court has given the record herein and the pertinent authorities another critical examination, a rehearing will be granted and the error of the Court rectified.

We, therefore, respectfully pray that this Petition for Rehearing be granted and that the Petition for Review of the decision of the Tax Court be denied.

January 10, 1947.

HERBERT A. FRIEDLICH,
HARRY THOM,
LOUIS A. KOHN,
Attorneys for Respondents.

MAYER, MEYER, AUSTRIAN & PLATT,
Of Counsel.

Endorsed: Filed January 11, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-third day of January, 1947, the following further proceedings were had and entered of record, to-wit:

Thursday, January 23, 1947.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner.*	Petition for Review of Decision of The Tax Court of the United States.
No. 8932 *vs.*	
Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	

It is ordered by the Court that the Petition for a Rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the thirty-first day of January, 1947, the Mandate of this Court issued to The Tax Court of the United States.

And afterwards, to-wit: On the tenth day of February, 1947, there was filed in the office of the Clerk of this Court, a Motion to Recall and Stay Mandate, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.
No. 8932	

MOTION TO RECALL AND STAY MANDATE.

Now come Respondents herein by their attorneys, Herbert A. Friedlich, Harry Thom and Louis A. Kohn, and move the court to stay and recall the mandate issued herein on January 31, 1947 for thirty (30) days pursuant to the provisions of Rule 25, and in support of said motion present the Suggestions of Herbert A. Friedlich, one of the attorneys for Respondent, dated February 10, 1947.

Herbert A. Friedlich,
Harry Thom,
Louis A. Kohn,
Attorneys for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner*, vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.

No. 8932

SUGGESTIONS IN SUPPORT OF MOTION FOR RECALL AND STAY OF MANDATE.

In support of the motion of respondents herein for recall and stay of mandate in the above entitled cause, Herbert A. Friedlich, one of the attorneys for said respondents states:

Respondents' petition for rehearing in said cause was denied on January 23, 1947, and the mandate of this court in this cause was issued and forwarded to the Clerk of the Tax Court at Washington, D. C. on January 31, 1947. Respondents have since determined to make application for certiorari to the Supreme Court of the United States in order to obtain a review of the judgment of this court and intend to perfect such application within the time provided by law.

Herbert A. Friedlich,
One of the Attorneys for Respondents herein.

February 10, 1947.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue, *Petitioner,* vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.

No. 8932

NOTICE.

To:

Sewell Key, Acting Assistant Attorney General,
Melva M. Graney, Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.

You Are Hereby Notified that we will on behalf of Respondents herein on this 10th day of February move the United States Circuit Court of Appeals for the Seventh Circuit, before whom the above cause is pending, for a recall and stay of mandate in accordance with the provisions of Rule 25 of said court, a copy of which motion and supporting suggestions is herewith served upon you.

Herbert A. Friedlich,
Harry Thom,
Louis A. Kohn,
Attorneys for Respondents.

February 10, 1947.

State of Illinois, }
County of Cook. } ss.

Vernon Misch, being duly sworn, says that he is employed by the law firm of Mayer, Meyer, Austrian & Platt, of Chicago, Illinois, and that on the 10th day of February, 1947, at the hour of 12:30 P. M. he served a copy of the attached motion together with a copy of the suggestions referred to in said motion upon each of the persons named in the attached notice by depositing in the United States Mails at Chicago, Illinois, said notice and copy of said motion and suggestions enclosed in a sealed envelope, postage prepaid, addressed to the said persons.

Vernon Misch.

Subscribed and sworn to before me this 10th day of February, 1947.

Alfred G. Johnson,
Notary Public.

Endorsed: Filed February 10, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventeenth day of February, 1947, the following further proceedings were had and entered of record, to-wit:

Monday, February 17, 1947.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

Commissioner of Internal Revenue, *Petitioner*, vs. Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents*.	Petition for Review of Decision of The Tax Court of the United States.
No. 8932.	

On motion of counsel for respondents, it is ordered that the Mandate of this Court, heretofore issued in this cause on January 31, 1947, be, and the same is hereby, recalled and stayed for a period of thirty (30) days pending respondents' application to the Supreme Court of the United States for a writ of certiorari.

And afterwards, to wit: On the twenty-sixth day of February, 1947, there was filed in the office of the Clerk of this Court, a Notice and Suggestion of Death, which said Notice and Suggestion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8932.

Commissioner of Internal Revenue, *Petitioner,* *vs.* Estate of Sidney M. Spiegel, Deceased, *et al.*, etc., *Respondents.*	Petition for Review of Decision of The Tax Court of the United States.

NOTICE.

To: Sewell Key, Acting Assistant Attorney General, Melva M. Graney, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

You Are Hereby Notified that we will on behalf of the Respondents herein on the 26th day of February, 1947 move the United States Circuit Court of Appeals for the Seventh Circuit for the entry of an order substituting Katherine J. Spiegel and Robert Michels, Surviving Executors under the Last Will and Testament of Sidney M. Spiegel, Deceased, as Petitioners (Respondents) herein in lieu of Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels as Executors aforesaid, it appearing that said Sidney M. Spiegel, Jr. has departed this life as set forth in the suggestion herewith served upon you together with this motion.

Herbert A. Friedlich,
Harry Thom,
Louis A. Kohn,
Attorneys for Respondents.

February 25th, 1947.

SUGGESTION.

In support of the aforesaid motion, Herbert A. Friedlich, one of the attorneys for said Petitioners (Respondents) states that Sidney M. Spiegel, Jr., one of the aforesaid Executors under the Last Will and Testament of Sidney M. Spiegel, Deceased, departed this life on October 19, 1944, and that said Katherine J. Spiegel and Robert Michels are now the duly qualified and acting Surviving Executors under the Last Will and Testament of Sidney M. Spiegel, Deceased.

Herbert A. Friedlich.

State of Illinois, } ss.
County of Cook. }

Vernon Misch, being duly sworn, says that on the 25th day of February, 1947, at the hour of 12:55 P. M., he served a copy of the attached Notice of Motion upon each of the persons named therein, by depositing in the United States Mails at Chicago, Illinois, said notice enclosed in a sealed envelope, postage prepaid, addressed to said persons.

Vernon Misch.

Subscribed And Sworn to before me this 25th day of February, 1947.

Alfred G. Johnson,
(Seal) *Notary Public.*

Endorsed: Filed February 26, 1947. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-sixth day of February, 1947, the following further proceedings were had and entered of record, to wit:

Wednesday, February 26, 1947.

Court met pursuant to adjournment.

Before:

Honorable Evan A. Evans, Circuit Judge.

Commissioner of Internal Revenue,

Petitioner,

No. 8932 *vs.*

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.,

Respondents.

On suggestion of counsel for respondents, it is ordered that Katherine J. Spiegel and Robert Michels, Surviving Executors under the Last Will and Testament of Sidney M. Spiegel, Deceased, be substituted as respondents herein in lieu of Sidney M. Spiegel, Jr., Katherine J. Spiegel and Robert Michels as Executors aforesaid, it appearing that the said Sidney M. Spiegel, Jr. is now deceased.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth S. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed (excepting stipulation extending time for Respondents' Brief), in:

Cause No. 8932.

Commissioner of Internal Revenue;
Petitioner,

vs.

Estate of Sidney M. Spiegel, Deceased, *et al.*, etc.,
Respondents,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 27th day of February, A. D. 1947.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI — Filed April 28, 1947.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1144 [illegible] 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM, and
LOUIS A. KOHN,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The above-named Petitioners, by Herbert A. Friedlich, Leo F. Tierney, Harry Thom and Louis A. Kohn, Petitioners' attorneys, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 28, 1946.

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 126) is not officially reported. The opinion of the Circuit Court of Appeals (R. 151-8) is not yet reported.

STATEMENT OF MATTER INVOLVED.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). Respondent alleged a deficiency in estate tax, due from Petitioners, of $454,788.58 (R. 8). Substantially all of the alleged deficiency arose out of inclusion by Respondent, in the gross estate of decedent, of $1,140,606.30 which was the value of personal property held under an *inter vivos* trust created by decedent in 1920 (R. 9). Respondent claimed that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 811(*c*) of the Internal Revenue Code (R. 29).

The pertinent facts, as established, may be summarized as follows:

In 1920, decedent, a resident of Illinois, transferred certain stocks and bonds to trustees, also residents of Illinois, by a written trust instrument (R. 25). The trust (R. 86-7)[1] provided for the payment of income equally to decedent's three named children during decedent's lifetime. Upon Spiegel's death, corpus of the trust was to be divided equally among the same

1. The salient provisions of the trust appear in footnote 2 to the opinion of the Circuit Court of Appeals (R. 151-2).

three children and, if any of the three children had died leaving children surviving, the surviving children of the deceased child would receive the share to which their parent would have been entitled, and, if any of the three children had died leaving no child surviving, the deceased child's share would go to the other named children and descendants of any other deceased child, *per stirpes*.

The trust made no provision whatsoever for reversion of the trust property to decedent or his estate, or for any other disposition, if Spiegel survived all of his three named children and all of their descendants. Decedent retained no power to alter, amend or modify the trust and no power of appointment.

Only taxability of corpus is here in question (R. 129). No question of contemplation of death is involved (R. 26).

At the creation of the trust in 1920, decedent was 47 years old and a widower, and his three children, named in the trust, were his only children and were 23, 15 and 13 years of age, respectively (R. 25). Decedent died more than 20 years later, aged 68 years, without remarrying, and leaving those three children, who were then 44, 36 and 34 years, respectively, and three grandchildren (children of a surviving daughter of decedent) who were then 10, 4 and 2 years, respectively (R. 25).

During the lifetime of decedent, his three children received the income of the trust estate (R. 25). On decedent's death, the three children received the corpus in equal shares (R. 26).

Petitioners did not include any part of the value of the trust estate in the gross estate of decedent returned for estate taxes (R. 26). Respondent, however, increased the value of the gross estate, as returned, by $1,151,189.21 (of which $1,140,606.30 represented the value of corpus of the trust estate, R. 9, 26) and, for that reason, alleged an estate tax deficiency of $454,788.58 (R. 8).

Petitioners petitioned The Tax Court of the United States for a redetermination of the deficiency and, in addition, claimed a refund of $4400 by reason of additional administration expenses not deducted in the return (R. 3). The Tax Court held that decedent had retained no "string or tie" amounting to a possibility of reverter (R. 129) and determined, accordingly, that no part of the value of the trust estate could be included in the gross estate of decedent for estate tax purposes (R. 129). The Tax Court decided that Petitioners were entitled to a refund of $2,423.95 (R. 133).

Respondent petitioned the Circuit Court of Appeals for the Seventh Circuit to review the decision of the Tax Court (R. 134). The Circuit Court of Appeals reversed the Tax Court, and, in its opinion, found that the entire value of corpus of the trust estate was properly included in the gross estate of decedent, holding that, by operation of Illinois law, "there was a possibility of the trust failing and the property returning to the settlor" (R. 157).

STATUTE INVOLVED.

Section 811(c) of the Internal Revenue Code:

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or

after his death, * * *; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

(26 U. S. C.—1940 ed.—Sec. 811.)

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159) and rehearing denied on January 23, 1947 (R. 201). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

I. Whether there was actually any possibility of reverter of the corpus of the trust to decedent by operation of Illinois law.

II. Whether the decision of the Circuit Court of Appeals conflicts with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.

III. Whether, under *Dobson* v. *Commissioner*, 320 U. S. 489, the decision of the Tax Court in favor of Petitioners must stand.

IV. Whether, even if decedent had any possibility of reverter by operation of Illinois law, the creation of the trust was a transfer intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Illinois law in a way which is in conflict with applicable Illinois decisions.[2]

The court below decided that the remainders, created by the Spiegel trust, were contingent, and that, consequently, decedent had a possibility of reverter by operation of Illinois law in the event all of his descendants predeceased him. Its decision conflicts irreconcilably with *Lachenmyer* v. *Gehlbach,* 266 Ill. 11 (1914), and the other applicable Illinois Supreme Court decisions which have consistently held that remainders, such as the Spiegel remainders, are vested, with the result that the settlor thereof has no possibility of reverter by operation of law in any event.

A grantor of a *vested* remainder does not, by operation of Illinois law, retain any possibility of reverter. Upon the death of a vested remainderman before termination of the preceding estate, his vested remainder passes under the remainderman's will or as his intestate property to his next of kin or escheats. On the other hand, a grantor of a *contingent* remainder does retain a reversion under Illinois law, and, therefore, has a possibility of reverter by operation of that law. In the event the grantor dies, his reversionary interest in a contingent remainder passes under the grantor's will or to his next of kin as his intestate property.

Under Illinois law, therefore, it cannot be determined whether a grantor of a remainder has a possibility of reverter by operation of law without first determining

3. See supporting Brief, pp. 16-21, for relevant authorities and argument with respect to this first reason for allowance of writ.

whether the remainder is vested or contingent. This involves technicalities of Illinois property law. Nevertheless, those technicalities are the factors, and the *only* factors, which, under Illinois decisions, govern the existence or nonexistence of any possibility of reverter by operation of law, and they must be faced.

This Court (in *Helvering* v. *Hallock*, 309 U. S. 106, *Fidelity-Philadelphia Co.* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Field*, 324 U. S. 113) has, it is true, stated in no uncertain terms that it will not decide tax liability under Section 811(c) of the Internal Revenue Code on the basis of niceties of conveyancing. However, each of those decisions, unlike the instant case, involved a trust which contained an *express* provision (whatever technical name was given to the provision) for a reverter under certain contingencies to, or for a testamentary power of appointment by, the grantor. None of those decisions required consideration of, or considered, a possibility of reverter solely by operation of law.

It is, of course, a truism that a possibility of reverter by operation of law—not by express provision of a trust instrument—*cannot* exist unless the applicable property law (Illinois, in this case) will, in fact, so operate as to cause the property to revert. The decisions of the Illinois Supreme Court are clear that a vested remainder cannot fail and revert, under any circumstances, since, by definition, there must always be someone (whether the remainderman or his legatees or next of kin) ready to take possession of a vested remainder whenever and however the preceding estate terminates. Accordingly, there can be no possibility of reverter by operation of Illinois law with respect to a vested remainder; the settlor or his estate cannot possibly retake. This Court, in *Blair* v. *Commissioner*, 300 U. S. 5, 9-10, held that "the character of the trust, the nature and extent of the interest of the

beneficiary, and the power of the beneficiary to assign that interest in whole or in part" must be determined by the local property law—here, Illinois law.

There is no doubt that, under Illinois law, the Spiegel remainders were vested. At the oral argument before the Circuit Court of Appeals, Respondent's counsel so conceded. The Circuit Court of Appeals, nevertheless, held the remainders to be contingent, reaching that result by disregarding Respondent's concession and all of the Illinois authorities as to vesting. It frankly refused to follow Illinois decisions as to vesting of remainders under wills in the erroneous belief that those decisions are inapplicable to *inter vivos* instruments (R. 153). The Illinois Supreme Court, however, has definitely held that its decisions with respect to vesting under wills are likewise applicable to vesting under *inter vivos* instruments.

Under Illinois law, the remainders vested in interest immediately upon creation of the trust, notwithstanding they were subject to divestment by conditions subsequent or executory limitations in the event that a child (vested remainderman) predeceased the settlor. Such remainders have, as stated in *Warrington* v. *Chester*, 294 Ill. 524, 529 (1920), "all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition."

Further, under Illinois law, the vested remainders in Spiegel's children could be divested only if the divesting conditions occurred exactly as specified in the trust. Accordingly, they could have been divested in favor only of the persons specified to take if a child predeceased the settlor, that is, only in favor of other children or descendants of children.

The Spiegel trust contained no express provision for reverter. If any or all of Spiegel's children had died

during Spiegel's lifetime, the corpus of the trust could not have reverted to Spiegel but the deceased children's interests would have passed under the wills of the children or to the children's next of kin as the children's intestate property, subject only to subsequent divestment, upon Spiegel's death, in favor of other children or children's descendants, if any, who might survive Spiegel. If no child and no child's descendant survived Spiegel, the legatees or next of kin of deceased children would not be divested and would take possession of the corpus. Spiegel could not have received the trust property regardless of what happened unless he became a legatee or next of kin of one of his children.

Section 81.17 of Estate Tax Regulations 105, applicable to Section 811(c) of the Internal Revenue Code, provides that a transfer is not intended to take effect in possession or enjoyment at or after death unless (in addition to postponed possession or enjoyment) "the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)." Spiegel possessed no interest in the property by the terms of the trust, and no possibility of interest by operation of Illinois law, and, hence, no part of the trust corpus was includable in his gross estate.

2. The decision of the Circuit Court of Appeals is in conflict with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929). The *Reinecke* decision is controlling here.[3]

There is no difference, which can affect estate tax liability, between the *Reinecke* "five trusts", held non-taxable, and the Spiegel trust. The remainders in the *Reinecke* "five trusts", just as in the Spiegel trust, vested

3. See supporting Brief, pp. 22-24, for argument with respect to this second reason for allowance of writ.

in interest immediately upon creation of the trusts, although in neither the *Reinecke* nor the instant case could possession of corpus be taken until a time at or after the settlor's death.[4] In each case, if a remainderman predeceased the settlor, there was an express gift over to others than the settlor. In neither case was there any provision for reverter to the settlor. Illinois law controlled the *Reinecke* decision and governs here. The provisions of Section 402(c) of the Revenue Act of 1921, which governed the *Reinecke* case, are essentially the same as those of Section 811(c), at issue in this case.

In the *Reinecke* case, this Court held that the property, comprising the "five trusts", was not includable in the deceased settlor's gross estate, and Petitioners here should similarly be held not liable for the deficiency claimed.

The *Reinecke* case has never been overruled by this Court and the decision there cannot be reconciled with that of the Circuit Court of Appeals in the instant case. The Tax Court decided the instant case on the authority of the *Reinecke* decision (R. 129).

3. The decision below is in conflict with decisions of this Court with respect to finality of decisions of the Tax Court.[5]

The Tax Court held (R. 129) that Spiegel had not made a transfer intended to take effect in possession or enjoyment at or after his death. The Tax Court's decision involved a mixed question of law and fact, not a clear-cut question of law. In considering cases under Section 811(c) of the Internal Revenue Code, the Tax Court, as it states in *Estate of Nettie Friedman, Deceased*, 8 T. C. , No. 7 (1947), proceeds on the assumption that it "must

4. See p. 23 of supporting Brief for provisions of the *Reinecke* "five trusts."

5. See supporting Brief, pp. 24-27, for relevant authorities and argument with respect to this third reason for allowance of writ.

look to the intention of the grantor of the trust", and in the instant case it, in fact, received evidence of Spiegel's intent (R. 33-5). In determining intention, it examines both the instrument involved and the framework of extrinsic circumstances, and did so in the instant case (R. 32, 35-6). Intention is a question of fact.

This Court held, in *Dobson* v. *Commissioner*, 320 U. S. 489, 502 (1943), that the decision of the Tax Court must stand unless the elements of its decision may be separated "so as to identify a clear-cut mistake of law". In the instant case, no such separation can be made. The Circuit Court of Appeals should, therefore, have affirmed the Tax Court.

4. The Circuit Court of Appeals decided that Petitioners are liable for tax solely because of the existence of a possibility of reverter by operation of law. It thus decided an important question of federal law which has not been, but should be, settled by this Court.

Even though the Spiegel remainders had been contingent (as the Circuit Court of Appeals erroneously determined) and had, therefore, left the settlor with a remote possibility of reverter by operation of law, this Court has not passed upon whether the existence of a mere possibility of reverter *by operation of law* renders trust property taxable under Section 811(c) of the Internal Revenue Code. That question should be finally passed on by this Court.[6]

Three Circuit Courts of Appeals (for (i) the Seventh Circuit in this case, (ii) the Second Circuit in *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (1946), and (iii) the Ninth Circuit in *Commissioner* v. *Bank of California (Estate of M. E. Girvin)*, 155 F. 2d 1 (1946), *certiorari* denied, 67 S. Ct. 73) have held that, notwithstanding the absence

6. See supporting Brief, pp. 28-31, for relevant authorities and argument with respect to this fourth reason for allowance of writ.

of any express retention of rights by a settlor, the existence of a mere possibility of reverter by operation of law constitutes a trust a transfer intended to take effect in possession or enjoyment at or after the settlor's death, and, therefore, requires inclusion of the trust property in the deceased settlor's gross estate for estate tax purposes. Those courts stated that they considered themselves bound by this Court's *Hallock*, *Fidelity-Philadelphia* and *Field* decisions, in each of which this Court was considering an express reservation by a settlor, not a possibility of reverter by operation of law. Each of those Circuit Courts of Appeals' decisions reversed a Tax Court decision.

Directly opposed to those decisions of the Circuit Courts of Appeals, the Tax Court (in (i) *Estate of Nina M. Campanari*, 5 T. C. 488 (1945), (ii) *Estate of Edward P. Hughes*, 7 T. C. ....., No. 157 (1946) and (iii) *Estate of Nettie Friedman*, 8 T. C. ....., No. 7 (1947)) held that a mere possibility of reverter by operation of law, and not by express provision, does not require inclusion of trust property in the gross estate of a decedent. Each of the Tax Court's decisions was subsequent to the decisions of this Court in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases.[7] The Tax Court's decisions in the *Hughes* and *Friedman* cases were subsequent to the decisions of the Circuit Courts of Appeals in the *Bayne* and *Girvin* cases and after denial of certiorari in the *Girvin* case. In the *Campanari* case, the Tax Court stated that the *Fidelity-Philadelphia* decision was not applicable, and, in the *Hughes* and *Friedman* cases, that the *Hallock*, *Fidelity-Philadelphia* and *Field* decisions of this Court did not apply.

7. Just as in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases, and unlike the case at bar, in the *Bayne* and *Girvin* cases and in each of the Tax Court cases, the settlor reserved an interest in income.

There is, therefore, an irreconcilable conflict between the Tax Court and the Circuit Courts of Appeals as to proper interpretation of this Court's decisions in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases as applied to mere possibilities of reverter by operation of law.

The question of applicability of those decisions to such possibilities of reverter, still undecided by this Court, arises frequently and generally involves large sums. The uncertain state of the law is most disturbing to taxpayers and to the bar generally. See, *Paul*, Federal Estate and Gift Taxation—1946 Supplement—pp. 170-201. It is important that this Court finally pass upon this question as soon as possible.

SUPPORTING BRIEF.

A supporting Brief, including Specification of Errors, is presented herewith.

WHEREFORE, it is respectfully submitted that the Writ of Certiorari should be granted.

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March 19, 1947.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

(2) In failing to hold that no part of such value was properly includable in decedent's gross estate.

(3) In holding that there should be included, in decedent's gross estate, property in which decedent had no interest.

(4) In holding that decedent had any possibility of reverter in the trust property by operation of Illinois law.

(5) In failing to hold the decision of The Tax Court of the United States to be conclusive.

(6) In reversing the decision of The Tax Court of the United States.

BRIEF AND ARGUMENT.

I.

SPIEGEL HAD NO POSSIBILITY OF REVERTER BY OPERATION OF ILLINOIS LAW AND NO OTHER INTEREST IN THE TRUST PROPERTY.

The trust made no provision for retention by, or reversion to, Spiegel of any interest in the trust and he, therefore, could not take the trust property pursuant to any term of the instrument.

The remainders vested in the named children upon creation of the trust and, therefore, the trust could not fail and the property could not revert to Spiegel by operation of Illinois law, which is controlling.

It Cannot Be Determined Under Illinois Law Whether the Grantor of a Remainder Has a Possibility of Reverter by Operation of That Law Without First Determining Whether the Remainder Is Vested or Contingent.

Upon the death of a vested remainderman, his vested remainder passes under the remainderman's will or as the remainderman's intestate property to his next of kin. *Baley* v. *Strahan*, 314 Ill. 213, 219, 220 (1924), cited in *Klein* v. *United States*, 283 U. S. 231, 234; *Hawkins* v. *Bohling*, 168 Ill. 214, 219 (1897); *Smith* v. *West*, 103 Ill. 332, 337, 339 (1882). If the vested remainderman dies intestate without next of kin, the remainder interest escheats. See Restatement of Law of Trusts, § 411 (*l*). Accordingly, a vested remainder cannot revert to the settlor by operation of Illinois law.

A grantor of a *contingent* remainder, on the contrary,

retains a reversionary interest and, therefore, has a possibility of reverter by operation of law. In the event the grantor dies, his contingent reversionary interest passes under the grantor's will or to his next of kin as his intestate property. *Gehlbach* v. *Briegel*, 359 Ill. 316, 320 (1935); *Matthews* v. *Andrews*, 290 Ill. 103, 105 (1919); *Belding* v. *Parsons*, 258 Ill. 422, 426 (1913).

The existence or non-existence of a possibility of reverter to a grantor by operation of law must be determined by the controlling local property law. Before it can be determined that such a possibility exists under Illinois law, it is necessary first to determine whether remainders created by the instrument are vested or contingent. If vested, no such possibility exists. If contingent, there is a possibility of reverter by operation of Illinois law.

The decisions of this Court, to the effect that it will not decide tax liability under Section 811(c) of the Internal Revenue Code on the basis of niceties of conveyancing, have all involved trusts which contained *express* provision for reverter under certain contingencies to, or for a power of appointment by, the grantor. See, *Helvering* v. *Hallock*, 309 U. S. 106 (1940); *Fidelity-Philadelphia Trust Co.* v. *Rothensies;* 324 U. S. 108 (1945); *Commissioner* v. *Field*, 324 U. S. 113 (1945). No question of reverter by operation of law was before this Court in any of those cases.

The three *Hallock* trusts contained express provisions for reversion to the grantor if he survived the remaindermen. See 309 U. S. at p. 115. The instruments, considered in *Klein* v. *United States*, 283 U. S. 231, 232, *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, 40, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, 50 (all referred to in the *Hallock* opinion), contained express provisions for reversions to the grantor if he survived the remaindermen. The *Fidelity-Philadelphia* trust gave the settlor a testamentary power of appointment if the re-

maindermen predeceased the settlor. See 324 U. S. at p. 109. The *Field* trust contained not only an express provision for reversion to the settlor if he survived the remaindermen but also gave him the right to reduce or cancel the remainders by will or other instrument. See 324 U. S. at pp. 115 and 117. In each case, the property would, if certain contingencies occurred, go back to the settlor by virtue of a specific provision of the trust instrument and this Court refused to consider technical differences in the provisions.

It is, however, self-evident that a possibility of reverter solely *by operation of law*—not by express provision of a trust—cannot exist unless the local applicable property law (here, Illinois law) will, in fact, so operate as to make a reverter a possibility.

Under Illinois Law, a Vested Remainder Cannot Fail or Revert.

Under Illinois decisions, a vested remainder cannot fail, and, therefore, the property cannot go back to the grantor in the absence of an express provision to that effect. By definition, a vested remainder is a present property interest of which someone must always be ready to take possession whenever and however the preceding estate terminates. If a vested remainderman dies prior to termination of the prior estate, there can be no reversion to the settlor, but (because the remainder is a then existing and inheritable property interest) either the remainderman's legatees or next of kin will take or there will be an escheat. *Baley* v. *Strahan, supra,* 314 Ill. at pp. 218-20 (1924), *Hawkins* v. *Bohling, supra,* 168 Ill. at p. 219 (1897); *Smith* v. *West, supra,* 103 Ill. at p. 339 (1882); Restatement of Law of Trusts, § 411 (*l*); *Kales*, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed. (1920), § § 93, 94, 327; *Gray*,

The Rule Against Perpetuities, 4th ed. (1942), § 101; Ill. Rev. Stat. 1945, Ch. 3, Sec. 162, Seventh.

The Spiegel Remainders Were Vested. Respondent Has Conceded They Were Vested.

There is no doubt that, under Illinois law, the Spiegel remainders were vested. On oral argument before the Circuit Court of Appeals, Respondent's counsel conceded that those remainders were vested. The fact that they might be divested pursuant to conditions subsequent or executory limitations, if a child (vested remainderman) predeceased, and other children or descendants of children survived, the settlor, did not change their vested character. *Lachenmyer* v. *Gehlbach*, 266 Ill. 11 (1914); *Welch* v. *Crowe*, 278 Ill. 244 (1917); *Boye* v. *Boye*, 300 Ill. 508, 511 (1921); *Murphy* v. *Westhoff*, 386 Ill. 136 (1944); *Stombaugh* v. *Morey*, 388 Ill. 392 (1944).

A remainder, subject to divestment upon the death of the remainderman prior to the death of the life tenant, is, under Illinois decisions, a vested remainder and clearly distinguishable from a contingent remainder conditioned upon the remainderman surviving the life tenant. See, *Warrington* v. *Chester*, 294 Ill. 524, 528-9 (1920).

The Spiegel remainders vested in interest immediately upon creation of the trust. *Hickox* v. *Klaholt*, 291 Ill. 544, 548 (1920), and cases there cited.

Rules governing the vesting of remainders in realty, likewise, govern vesting of remainders in personalty. *Winterland* v. *Winterland*, 389 Ill. 384, 388 (1945).

Authorities as to Vesting Under Wills Are Applicable to Inter Vivos Trusts.

Contrary to the holding of the Circuit Court of Appeals that decisions involving vesting under wills are inapplicable to vesting under *inter vivos* trusts (R. 153), Illinois authorities with respect to vesting under wills are, in fact, equally applicable to *inter vivos* instruments. *Smith* v. *Dugger*, 310 Ill. 624, 626-7 (1924); *Harder* v. *Matthews*, 309 Ill. 548, 566 (1923). In each of the last cited cases, counsel argued that authorities, dealing with vesting under wills, were not relevant to the determination of vesting under *inter vivos* instruments, but the Illinois Supreme Court refused to recognize any such distinction and cited and followed *Lachenmyer* v. *Gehlbach*, *supra*, which involved the construction of a will.

The Spiegel Remainders Could Not Possibly be Divested in Favor of Spiegel or His Estate.

Under Illinois law, vested remainders can be divested only if the divesting conditions occur exactly as specified in the instrument. *Illinois Land and Loan Co.* v. *Bonner*, 75 Ill. 315, 327 (1874); *McFarland* v. *McFarland*, 177 Ill. 208, 217 (1898); *Henderson* v. *Harness*, 176 Ill. 302, 309 (1898); *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110, 124 (1941).

The children's vested remainders were specifically subject to divestment in favor only of the persons named to take if a child predeceased the settlor, that is to say, only other children or descendants of children. If all of Spiegel's children and all their descendants had died during Spiegel's lifetime, the corpus of the trust would *not* have reverted to Spiegel or his estate. The children's vested interests would, under Illinois law, have

passed, upon the deaths of the children, under the wills of the children or to their next of kin as their intestate property, subject to divestment only in favor of any other children or any children's descendants, who might survive Spiegel. If, as assumed, no child or child's descendant survived Spiegel, possession of the trust corpus would, upon Spiegel's death, have gone to the legatees or next of kin of the deceased children—not to Spiegel or his estate. If all of the children died intestate and without next of kin, their vested interests would have escheated.

Spiegel could not have taken the trust property under any conditions, except, of course, as a legatee or next of kin of one of his children.

The Trust Property Was Not Taxable Under the Estate Tax Regulations.

Section 81.17 of Regulations 105, applicable to Section 811(c) of the Internal Revenue Code, provides that a transfer is not intended to take effect in possession or enjoyment at or after death unless (in *addition* to postponement of possession or enjoyment until at or after the settlor's death):

> "the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)."

Since Spiegel, at his death, possessed no possibility of right or interest in the trust property, either by the express terms of the trust or by operation of Illinois law, his estate cannot be liable for estate taxes based upon the value of any part of the trust corpus.

II.

THE INSTANT CASE IS CONTROLLED BY REINECKE v. NORTHERN TRUST COMPANY, 278 U. S. 339.

In the *Reinecke* case, this Court decided that the property, included in the so-called "five trusts" there before the Court, had, upon creation of the trusts, passed from the control of the settlor as completely, for all practical purposes, as if the transfers had been absolute and not in trust, and the "five trusts" were, therefore, held not to be subject to estate taxes.

There Is No Substantial Difference Between the Reinecke and Spiegel Trusts.

Each of the *Reinecke* "five trusts" terminated, and corpus thereof could be distributed, only *at or after the settlor's death,* and the remaindermen could take possession only if living at the date of distribution. Each of the trusts provided for gifts over to persons other than the settlor, in the event a remainderman did not survive the date of termination and distribution. There was no provision in any of the "five trusts" for any reversion to the settlor.

Erroneous Statement in This Court's Opinion as to Four of the Reinecke Trusts.

The *Reinecke* opinion (278 U. S. at p. 344), however, states that four of the "five trusts" were "terminable five years after the settlor's death or on the death of the respective life tenants, *whichever should first happen,*" with remainders over. If this statement is intended to mean that the trusts were terminable upon the death of an income beneficiary *prior* to the death of the settlor, it is submitted that the statement is incorrect.

The *Transcript of Record* in the *Reinecke* case (*Reinecke* v. *The Northern Trust Company*, No. 90, October Term, 1928) sets out the four trusts *verbatim*. Each of the four trusts provided (*Reinecke* Record pp. 20, 27, 35, 43) that the trust—

> "* * * shall terminate at the expiration of *five* (5) *years from the death of* [*the settlor*]; provided, however, that if [the child of the settlor named therein] shall die *prior* to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the *survivor* of [the settlor] and [the child of the settlor named therein]. And upon the termination of said trust the said trust shall be paid over to [the child of the settlor named therein] if he shall be then living, * * *." (Italics supplied.)

There followed provisions for remainders over to others than the settlor, in case the named child of the settlor was not living at the termination of the trust.

The Government's Brief, filed in this Court in the *Reinecke* case, correctly states (Statement of the Case, p. 6), with respect to the four trusts in question, that:

> "Trust No. 4478 (R. 17) is identical with trusts numbers 4479 (R. 25), 4480 (R. 32) and 4481 (R. 40), except as to the beneficiaries. * * * The trust terminates five years *after* the settlor's death or at the death of the *survivor* of the beneficiary and settlor (R. 20, 27, 35, 43). * * *" (Italics supplied.)

This Court decided the *Reinecke* case on the correct assumption, namely, that each of the "five trusts" terminated and was distributable *at or after* the death of the settlor. This appears from the statement of the Court (278 U. S. at p. 347) to the effect that the question presented was whether "the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed" is included within the taxing provisions of the applicable Revenue Act. The

Court's opinion, further, correctly considered the *Reinecke* case as one involving "a life estate in one with remainder over to another at or after the donor's death." (278 U. S. at p. 348.)

The Reinecke Trusts Were Held Non-Taxable and the Spiegel Trust Should, Likewise, Be Held Non-Taxable.

As to the *Reinecke* "five trusts," this Court held that the shifting of economic interests in the trust property, which was the subject of the tax, was complete when the trust was created (278 U. S. at p. 346), and that the statute did not tax completed *inter vivos* gifts (not in contemplation of death) where, as in the *Reinecke* case, the donor retained no control, possession or enjoyment of the property. (278 U. S. at p. 348.)

The Spiegel trust was, likewise, a completed gift upon its creation and the donor thereafter retained no control, possession or enjoyment of any part of the trust property. See pp. 19-21, *supra*, this Brief.

The principles, laid down in the *Reinecke* decision, are applicable to the instant case and it is submitted that this Court should hold that Petitioners are not liable for the tax claimed by Respondent.

III.

UNDER DOBSON v. COMMISSIONER, 320 U. S. 489, THE DECISION OF THE TAX COURT MUST STAND.

In the *Dobson* case, this Court held (320 U. S. at p. 501) that, if the Tax Court's decision has "'warrant in the record' and a reasonable basis in the law," it must be treated as final, since "'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'". The Court there

stated the applicable rule to be (320 U. S. at p. 502) that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."

The Circuit Court of Appeals for the Second Circuit, in *Brooklyn National Corporation* v. *Commissioner*, 157 F. 2d 450 (1946), *certiorari* denied 67 S. Ct. 96, has construed the *Dobson* decision to require (p. 452) that:

> "before we may substitute our own interpretation of the provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor."

The Tax Court's Decision in the Instant Case Involved a Mixed Question of Law and Fact.

In the case at bar, the Tax Court decided that Spiegel had retained no "string or tie" amounting to a possibility of reversion and did *not* make a transfer intended to take effect in possession or enjoyment at or after his death (R. 129). Spiegel's intent is a question of fact, for, as stated in *Edgington* v. *Fitzmaurice*, 29 Ch. D., 459, 483:

> "* * * the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

The Tax Court has consistently recognized that the intention of a grantor must be determined as a prerequisite to a decision that he made a transfer intended to take effect in possession or enjoyment at or after his death. Thus, in *Estate of Nettie Friedman, Deceased*, 8 T. C. ___, No. 7, 6 [C. C. H.] T. C. Decisions No. 15,552 (January 17, 1947), the Tax Court said (p. 25,913 of 6 T. C. Decisions):

> "We must look to the intention of the grantor of the trust, and the instrument of transfer must be examined to show such intent. * * *
>
> "In addition to the test of intention 'the framework of extrinsic circumstances' furnishes guidance * * *."

Similarly, in *James E. Henderson, Executor* v. *Rogan*, ...F. 2d..... (C. C. A. 9th, January 17, 1947), 47-1 U. S. T. C. [C. C. H.] ¶ 10,540, involving the question whether the exercise of a power of appointment by deed was subject to estate taxes because intended to take effect in possession or enjoyment at or after death, the Court said (p. 6216 of 47-1 U. S. T. C.):

> "The taxpayer has made no showing that the trial judge was unwarranted in finding as a fact that the decedent intended and was motivated by the desire that the transfers take effect at or after her death."

The Court of Claims, in *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 565, 566-7 (1945), likewise holds that, in order to tax an estate under Section 811(c) of the Internal Revenue Code (on account of a transfer intended to take effect at or after death), the facts must show that the settlor intended to make such a transfer.

The Tax Court Received Evidence That Spiegel Did Not Intend the Trust to Take Effect at or After His Death.

Here, the evidence before the Tax Court justified a decision that Spiegel intended the transfer in trust to be a present absolute conveyance in connection with which he retained no rights whatsoever.

The attorney, who drew the trust, testified that Spiegel had, on several occasions prior to the drafting of the trust, stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children and wanted at no time to have any interest or title therein.

The attorney testified, further, that, in drafting the trust, he had endeavored to carry out those instructions and believed he had done so (R. 34-5).

In addition, "the framework of extrinsic circumstances," which the Tax Court uses as a guide, makes it clear that Spiegel had no intention of making a transfer which would or could revert to him. In the Spiegel case, as in the *Friedman* case, *supra,* the Tax Court heard evidence from which it could properly find that the probability of any reverter by operation of law (if such a reverter had been possible) was so remote as to make it certain that the settlor had no intention of retaining any interest or possibility of interest in the trust property. Respondent introduced evidence of Spiegel's age at the date of the trust's inception, the then ages of his three children, the then probability (less than 2 chances in 100) that he would survive his children, and the then actuarial value (less than $4500) of any possibility of getting back the trust property (valued at more than $1,140,000 at date of death) provided he survived his three children (R. 35-6). Petitioners introduced similar evidence of Spiegel's age at date of death, the then ages of his three children and three grandchildren, the then probability (less than 2 chances in 10,000) that he would survive his then living three children and three grandchildren, and the then actuarial value (less than $85) of any possibility of receiving the trust property back in the event he survived his six children and grandchildren (R. 32). The Tax Court's Findings of Fact adopted this evidence (R. 128-129).

There is, therefore, no doubt that the Tax Court's decision was not based upon a clear-cut question of law, but resulted from application of the law to evidence of intent.

The Tax Court, in the instant case, decided mixed questions of law and fact, and the Circuit Court of Appeals

should, therefore, have affirmed the decision of the Tax Court.

IV.

THIS COURT HAS NOT PASSED UPON THE QUESTION WHETHER A MERE POSSIBILITY OF REVERTER BY OPERATION OF LAW RENDERS TRUST PROPERTY TAXABLE UNDER SECTION 811(c).

THAT QUESTION SHOULD BE SETTLED BY THIS COURT.

Since the Spiegel remainders were vested and, accordingly, Spiegel actually had no possibility of reverter by operation of Illinois law, the question of applicability of Section 811(c) of the Internal Revenue Code to mere possibilities of reverter by operation of law is not presented by the instant case. However, even though this Court should conclude, as did the Circuit Court of Appeals, that the remainders were contingent and that, therefore, such a possibility existed, this Court has never decided that, or considered whether, the existence of a mere possibility of reverter by operation of law requires inclusion of the property, which is subject to such possibility, in the settlor's gross estate under Section 811(c).

Interpretation of Hallock and Related Decisions by Circuit Courts of Appeals.

Three Circuit Courts of Appeals (for the Seventh Circuit in the instant case, the Second Circuit in *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (1946), and the Ninth Circuit in *Commissioner* v. *Bank of California* (*Estate of M. E. Girvin*), 155 F. 2d 1 (1946), *certiorari* denied, 67 S. Ct. 73) have (reversing decisions of the Tax Court) held that, even though a trust contains

no express retention of any right of reverter, the existence of a mere possibility of reverter by operation of law is sufficient to require inclusion of the trust property in the deceased settlor's gross estate.[8] Each of those Circuit Courts of Appeals considered itself bound so to decide in the belief that this Court's decisions in the *Hallock, Fidelity-Philadelphia* and *Field* cases controlled. In those three cases, however, this Court considered, not reverters by operation of law, but *express* reservations of rights to get the property back if certain contingencies occurred. See pp. 17-18, *supra*, this Brief.

Interpretation of Hallock and Related Decisions by the Tax Court.

The Tax Court has taken and maintains a position directly opposite that of the Circuit Courts of Appeals, and holds that, even though a mere possibility of reverter by operation of law does exist, Section 811(c) does not, for that reason, require the inclusion of corpus in the deceased settlor's gross estate. In *Estate of Nina M. Campanari*, 5 T. C. 488 (1945), *Estate of Edward P. Hughes*, 7 T. C. ....., No. 157, 6 [CCH] T. C. Decisions No. 15,510 (December 16, 1946), and *Estate of Nettie Friedman*, 8 T. C. ....., No. 7, 6 [CCH] T. C. Decisions No. 15,552 (January 17, 1947), the court held that, regardless of the existence of a possibility of reverter by operation of law, the corpus of the trust could not be included in the gross

8. The Fifth Circuit takes the same view. See *Thomas* v. *Graham*, 158 F. 2d 561 (1946). The *Thomas* case was an appeal from a District Court and involved not only possibility of reverter by operation of law but also the question of contemplation of death. There, Hutcheson, C. J., concurred on the contemplation of death issue but dissented from the holding that the existence of a mere possibility of reverter by operation of law requires inclusion of trust corpus in a decedent's gross estate. See also, *Beach* v. *Busey*, 156 F. 2d 496 (C. C. A. 6th, 1946), *certiorari* denied, which is in accord with the *Bayne* and *Girvin* decisions on this point.

estate. Each of the Tax Court decisions was rendered after the *Hallock, Fidelity-Philadelphia* and *Field* decisions.

In the *Campanari* decision, the Tax Court stated that the case before it was clearly distinguishable from the *Fidelity-Philadelphia* case, and held that there was no estate tax liability. In the *Hughes* decision (rendered after the decision of the Circuit Courts of Appeals in both the *Girvin* and *Bayne* cases and after denial of certiorari in the *Girvin* case), the Tax Court recognized (p. 25,595 of 6 [CCH] T. C. Decisions) that the Second Circuit's *Bayne* decision

> "holds that those decisions [*Fidelity-Philadelphia* and *Field*] require the inclusion in decedent's estate of the trust corpus where there exists a possibility of reverter even if only by implication of law and irrespective of how remote such possibility may be".

The Tax Court, however, refused to follow the *Bayne* decision, stating that it "differs from our interpretation of the decisions of the Supreme Court". In the *Friedman* case (likewise decided after the decisions of the Circuit Courts of Appeals in both the *Bayne* and *Girvin* cases and after denial of certiorari in the *Girvin* case), the Tax Court adhered to its view that a mere possibility of reverter by operation of law does not render a transfer one intended to take effect in possession or enjoyment at or after the death of the settlor, although it expressly stated that the *Bayne* decision interpreted the *Hallock, Field* and *Fidelity-Philadelphia* decisions differently. See also, *Estate of George P. Rhodes*, 6 [CCH] T. C. Decisions, No. 15,647 (M) (February 24, 1947), at p. 26,356-7.

Conflicting Interpretations of This Court's Decisions.

There is, therefore, an irreconcilable conflict between the Tax Court and at least three Circuit Courts of Appeals as to the application of this Court's decisions in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases, where there exists a mere possibility of reverter to the settlor by operation of law. The Tax Court recognizes the conflict but, nevertheless, has consistently refused, and, as late as January 17, 1947, continued to refuse, to follow the Circuit Courts of Appeals' interpretation.[9]

The instant case and the *Bayne* and *Girvin* cases were all decided by the Tax Court in favor of the taxpayers. In each case, however, a Circuit Court of Appeals reversed the Tax Court because it considered itself bound by this Court's decisions.

The resulting confusion and uncertainty on this point makes speedy clarification by this Court imperative. The question arises frequently and often the payment of large amounts of taxes (over $450,000 in the case at bar) is involved. Either the Tax Court or the Circuit Courts of Appeals—not both—have correctly interpreted this Court's opinions. However, which court is right will not, and cannot, be settled until this Court authoritatively passes upon the proper interpretation of its own decisions.

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9. In the instant case, the settlor retained neither a life estate nor any reversionary interest. In the *Fidelity-Philadelphia* and *Field* cases, however, the settlor not only expressly retained a reversionary interest but also reserved an interest in income, which further distinguishes those cases from the case at bar. See: *Paul*, Federal Estate and Gift Taxation, 1946 Supplement, pp. 192-3; *Spencer*, The Federal Estate Tax on *Inter Vivos* Trusts: A Common Sense Rule for Hallock Cases, 59 Harv. L. Rev. pp. 43, 67, note 59 (1945); *Eisenstein*, The Hallock Problem: A Case Study in Administration, 58 Harv. L. Rev. 1141, 1169 (1945). Likewise, in both the *Bayne* and *Girvin* cases and also in the three cited Tax Court cases, the settlor retained an interest in income.

Conclusion.

It is submitted that the Writ of Certiorari should be granted for the following reasons:

1. Spiegel retained no express right of reversion and no other interest whatsoever in the trust property, and controlling Illinois law would not have operated to cause the trust property to revert to Spiegel under any circumstances.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of this Court in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.

3. The decision of the Tax Court that Spiegel did not make a transfer, intended to take effect in possession or enjoyment at or after his death, involved a mixed question of law and fact and not a clear-cut question of law. Therefore, the Circuit Court of Appeals should have affirmed the Tax Court under the principles laid down in *Dobson* v. *Commissioner*, 320 U. S. 489.

4. At least three Circuit Courts of Appeals hold that this Court's decisions (in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases) do, and the Tax Court continues to hold that those same decisions do not, require estate taxes to be imposed under Section 811(c) of the Internal Revenue Code on transfers with respect to which the settlor retains no express rights and his only possibility of a reverter is by operation of local property law upon a failure of the trust. This Court should settle the question as soon as possible.

Respectfully submitted,

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LEO F. TIERNEY,

HARRY THOM,

LOUIS A. KOHN,

Attorneys for Petitioners.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1144

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI.

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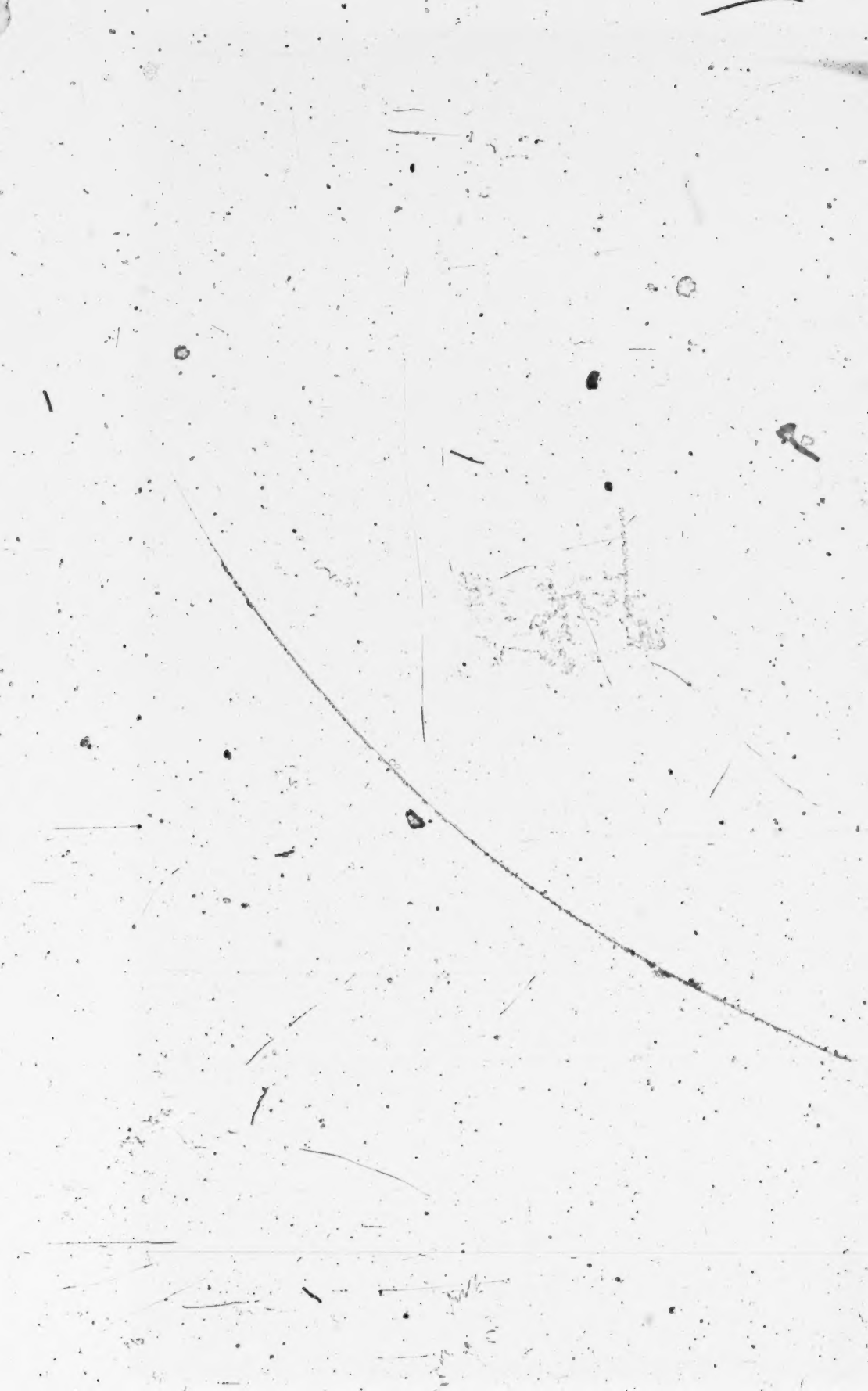

IN THE

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OCTOBER TERM, 194[illegible]

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Now come Petitioners, by Herbert A. Friedlich, Leo F. Tierney, Harry Thom and Louis A. Kohn, their attorneys, and hereby supplement their Petition for a Writ of Certiorari, filed herein on March 21, 1947, as follows:

On March 17, 1947, the United States Circuit Court of Appeals for the Third Circuit handed down its opinion in *Commissioner* v. *Estate of Church*, Case No. 8993 (attached hereto as an Appendix). That decision affirmed the Tax Court's holding that corpus of an *inter vivos* trust, in which the only interest of the decedent-settlor at his death was a possibility of reverter by operation of law, was not

includible in the gross estate of the decedent for estate tax purposes. This opinion of the Third Circuit has not yet been officially reported and did not come to the attention of Petitioners until March 28, 1947.

As a result of this decision of the Third Circuit, there are two additional reasons for granting the Writ prayed for, which are hereby added (as numbers 5 and 6) to the reasons for granting the Writ set forth in the Petition heretofore filed herein:

5. The decision of the Third Circuit in the *Church* case is in conflict with the decision of the Seventh Circuit in the instant case with respect to the application of *Dobson* v. *Commissioner*, 320 U. S. 489.

In the *Church* case, the settlor created a trust in 1924. Unlike the instant case, income was to be paid to the settlor during his life. However, as in the instant case, the trust terminated on the settlor's death. Upon termination, the corpus was to be distributed to the settlor's issue then living, or, if none survived, then in equal shares to the settlor's brothers and sisters then living, any child or children of a deceased brother or sister to take the share to which their parent would have been entitled if living. As in the case at bar, no express provision was made for the contingency that, upon the death of the settlor, there might be no surviving issue of the settlor and no surviving brothers and sisters or issue thereof.

The Tax Court had held (in *Estate of Church* v. *Commissioner*, 3 T. C. M. [C. C. H. 1944] Dec. 14287(M), not officially reported) that the mere possibility of reverter to the settlor by operation of law, if all remaindermen died prior to the death of the settlor, did not bring the case within this Court's *Hallock* decision. The Third Circuit affirmed the Tax Court, stating that (Appendix, p. 2):

> "We think that the decision of the Tax Court must be affirmed. The issue presented seems to be one re-

served to the determination of the Tax Court by the decisions of the Supreme Court in *Dobson* v. *Commissioner*, 320 U. S. 489, in *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, and in later very pertinent decisions. We cannot 'identify a clear mistake of law * * *' in the Tax Court's decision in the case at bar."

In the instant case, the Seventh Circuit held that the decision of the Tax Court was on a "pure question of law" (R. 158), and refused to follow the Tax Court. In the *Church* case, the dissenting judge took the same view.

There is, therefore, a clear conflict between Circuits as to the binding effect of decisions of the Tax Court. As a matter of fact, the instant case is a stronger case for the application of the *Dobson* rule than is the *Church* case, since in that case no testimony of the settlor's actual intent appears to have been received in evidence.

6. The decision in the *Church* case results in a further conflict with the decision of the Seventh Circuit Court of Appeals in the instant case. In the *Church* case, corpus of an *intervivos* trust was held nontaxable, notwithstanding the existence of a possibility of reverter by operation of law. In the instant case, corpus of the trust was held taxable solely because the court found (erroneously, we submit) that a possibility of reverter by operation of law existed.

The dissenting judge in the *Church* case said (Appendix, pp. 4-5):

"At the outset, it should be noted that the Tax Court disposed of this case before three highly important decisions of the Supreme Court were rendered: *Fidelity Co.* v. *Rothensies*, 324 U. S. 108 (1945); *Commissioner* v. *Estate of Field*, 324 U. S. 113 (1945), and *Goldstone* v. *United States*, 325 U. S. 687 (1945). Although those rulings apparently have not changed the position of the Tax Court, they have been the basis of a contrary ruling by four Circuit Courts of Appeals, and constitute

the prime reliance of appellant in this case. *Consequently, the majority opinion places this court squarely in conflict with the position taken by four other circuit courts.*" (Italics supplied and footnotes omitted.)

The result of the decision in the *Church* case is to align the Third Circuit with the Tax Court, as opposed to the Second, Fifth, Seventh and Ninth Circuits, on the question whether a mere possibility of reverter by operation of law renders corpus of an *intervivos* trust taxable under Section 811(c) of the Internal Revenue Code. See, Petition pp. 11-13.

WHEREFORE, Petitioners pray that the above be considered a Supplement to its Petition for a Writ of Certiorari herein and that the Writ be granted.

March 31, 1947.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM,
LOUIS A. KOHN,
Attorneys for Petitioners.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 8993 October Term 1945

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued January 9, 1946
Reargued May 10, 1946
Before BIGGS, MARIS, GOODRICH, MCLAUGHLIN and O'CONNELL, *Circuit Judges.*

OPINION OF THE COURT
(Filed March 17, 1947)

By BIGGS, *Circuit Judge.*

The question presented by the case at bar is whether a transfer of property in trust made by the decedent, Church, in his lifetime is includible in his gross estate for the purpose of imposition of estate tax. See Section 811(c) of the Internal Revenue Code, 26 U.S.C.A. § 811(c), Section 302(c) of the Revenue Act of 1926 as amended, 44 Stat. 70. The trust indenture, executed by Church on May 17, 1924, provided that the income from the trust should be paid to him during life, that on his death the trust should

terminate, the corpus to be distributed to his issue then surviving; that in the event he should have no lawful issue surviving the principal amount of the trust with any increment should be paid in equal shares to his brothers and sisters then surviving, any child or children of a deceased brother or sister to take the share per stirpes which the parent would have been entitled to receive if living. No power to amend, alter or revoke the trust was reserved by Church. On the date of the creation of the trust he had one brother and one sister of the full blood and four half-brothers. There were then living seven children of the brothers of the half-blood. Church was then unmarried and had no children. At his death he was survived by his brother of the whole blood who had two children who were then living; by his sister of the whole blood who had one child then living; and by his four half-brothers, who had seven children then living.

The Commissioner took the position that the corpus of the trust was includible in the decedent's gross estate. The Tax Court overruled the Commissioner's determination and he appealed.

We think that the decision of the Tax Court must be affirmed. The issue presented seems to be one reserved to the determination of the Tax Court by the decisions of the Supreme Court in Dobson v. Commissioner, 320 U. S. 489, in Wilmington Trust Company v. Helvering, 316 U.S. 164, and in later very pertinent decisions. We cannot "identify a clear-cut mistake of law . . ." in the Tax Court's decision in the case at bar. See the Dobson case *supra*, at pp. 501-502. In Equitable Life Assurance Society v. Commissioner, 321 U. S. 560, the Supreme Court stated that it was not its task to draw inferences from facts or to supplement stipulated facts, that function resting with the Tax Court. The Supreme Court said that it could modify or reverse the decision of the Tax Court only if that tribunal's determination was "not in accordance with law." Assuredly the function referred to does not lie in this court.

In Commissioner v. Scottish American Co., 323 U.S. 119, 122, the Supreme Court reversed us, stating that the Tax Court drew certain inferences and conclusions which we could not overrule since there was no clear-cut mistake of law. Mr. Justice Murphy laid emphasis upon the validity of factual patterns as found by the Tax Court saying, *id* at p. 125, "The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings." In Choate v. Commissioner, 324 U.S. 1, the Supreme Court placed emphasis upon the right of the Tax Court to weigh the legal effect of documentary evidence and in effect admonished the Circuit Courts of Appeals that the legal effect of the transactions as found by the Tax Court generally should not be disturbed. In Trust of Bingham v. Commissioner, 325 U.S. 365, 370-371, it was said that even if "clear-cut questions of law" were presented the Tax Court's decision was entitled to great weight and that reviewing courts may set aside a decision of the Tax Court only when it announces a rule of general applicability which falls short of meeting statutory requirements. In this connection emphasis was laid on the fact that the Tax Court in general decided each case on a particular pattern of circumstances. In Kelley Co. v. Commissioner and Talbot Mills v. Commissioner, 326 U.S. 521, this doctrine seemingly was reiterated.

In the light of the foregoing decisions we think that we may not set aside the finding of the Tax Court in the instant case that ". . . no part of the corpus of the trust is includible in the estate of the decedent as a transfer 'intended to take effect in possession or enjoyment at or after his death.'" Accordingly the decision of the Tax Court will be affirmed.

O'CONNELL, *Circuit Judge*, Dissenting.

The basis of the majority opinion is that no clear-cut mistake of law on the part of the Tax Court can be identi-

fied; consequently, under the *Dobson* doctrine, this court is without power to reverse the Tax Court decision. I agree that the review function of this court has been limited to clear-cut mistakes of law; but I respectfully dissent from the pronouncement that the case at bar does not fit that description.

There was no contest as to the facts, nor as to the inferences drawn by the Tax Court. In a trust created prior to March 3, 1931, the decedent reserved a life estate in the income, and, according to the Tax Court, "disposed of his interests in the corpus as well as any man could."[1] The fact remains, however, that, by operation of law, a reversionary interest in favor of decedent did exist.[2] The sole question decided by the Tax Court was whether that reversionary interest brought this case within the principle of May v. Heiner, 281 U. S. 238 (1930), or that of Helvering v. Hallock, 309 U. S. 106 (1940). In short, the issue was: Should an estate tax be imposed on the entire corpus because a reversionary interest created by law was coupled with a life estate? It seems to me that even a cursory reading of the Tax Court opinion establishes that the Tax Court treated this as a pure question of law. Indeed, I consider the conclusion irresistible that the issue could be treated in no other way. As I analyze this case, therefore, it was incumbent upon this court to decide whether the Tax Court correctly decided a purely legal question.

At the outset, it should be noted that the Tax Court disposed of this case before three highly important decisions

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[1] But see Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court); cert. den. January 6, 1947. An interesting feature of *Beach v. Busey* is that, unlike the case at bar, the settlor made a gift over to his "heirs," also designated as "lineal descendants." Clearly, the settlor in that case attempted to dispose of his interest in the corpus. The Supreme Court nevertheless denied certiorari of a decision taxing the corpus of the trust to the settlor, because of the reversionary interest created by operation of law.

[2] Appellee faintly suggests that, under the law of New York, decedent had no reversionary interest. The fundamental rule, however, is that a clear expression of purpose is required to divest the settlor of a reversionary interest, even though the trust is to continue until the death of the reversioner. See Doctor v. Hughes, 225 N. Y. 305, 311 (1919).

of the Supreme Court were rendered: Fidelity Co. v. Rothensies, 324 U. S. 108 (1945); Commissioner v. Estate of Field, 324 U. S. 113 (1945); and Goldstone v. United States, 325 U. S. 687 (1945).[3] Although those rulings apparently have not changed the position of the Tax Court,[4] they have been the basis of a contrary ruling by four Circuit Courts of Appeals,[5] and constitute the prime reliance of appellant in this case. Consequently, the majority opinion places this court squarely in conflict with the position taken by four other circuit courts.

It seems to me the majority holding is susceptible of only two explanations: either it is felt that, notwithstanding the fact that the question is purely one of law, the *Dobson* doctrine forbids review unless the error of the Tax Court is beyond doubt; or the majority believes that, on the merits, the Tax Court reached the proper conclusion.

The difficulty I have with the former explanation is that, theoretically at least, once the facts are established there can be only one correct governing principle of law. While the interpretation of the Tax Court may and should be given "great weight" in determining that principle, can it be unequivocally stated that such determination of the legal question by the Tax Court does not warrant appellate scrutiny, where four circuit courts have endorsed a contrary interpretation on virtually identical facts, and the Tax Court itself has decided a similar case in favor of the imposition of the tax?[6]

The second explanation, that the Tax Court was correct on the merits, likewise is subject to penetrating analy-

[3] The Tax Court decision was entered December 5, 1944, exactly two months before the *Fidelity Co.* and *Field* decisions.

[4] Estate of Edward P. Hughes, 7 T. C. No. 157, promulgated December 16, 1946.

[5] Commissioner v. Bank of California, 155 F. 2d 1 (C. C. A. 9, 1946, reversing Tax Court); Commissioner v. Bayne's Estate, 155 F. 2d 475 (C. C. A. 2, 1946, reversing Tax Court); Beach v. Busey, 156 F. 2d 496 (C. C. A. 6, 1946, affirming District Court), cert. denied January 6, 1947; Thomas v. Graham, —— F. 2d —— (C. C. A. 5, decided December 12, 1946, reversing District Court).

[6] Estate of Thomas P. Leaman, 5 T. C. 699 (1945).

sis. Such explanation requires strained mental gyrations to remove the instant case from the language of the three Supreme Court decisions.[7] It permits radically different tax results to stem from reversionary interests which are equally remote and unlikely, dependent upon the happenstance of whether or not the settlor ignored the reality that in the eyes of the law he had not released his entire interest in the corpus. It looks away from the fact that decedent, in a formal instrument, has created a trust under the provisions of which an interest retained by him, however remote it may be, is in fact transferred at his death. Finally, it sanctions an extension of the doctrine enunciated in May v. Heiner, *supra*, which case has been cited by the Supreme Court only twice since Helvering v. Hallock, *supra*.[8]

It is appropriate at this point to stress that, to support the decision of the Tax Court, it must be assumed that *May v. Heiner* still retains its original vigor, and that the *Hallock* doctrine has not sounded its elegy. It is not my intent to review the volumes which have been written about *May v. Heiner*. It is sufficient to note that comment has been almost universally adverse;[9] and that, one day after *May v. Heiner* was cited as controlling decision of three similar cases, the congressional intent was clearly established in an unanimous Joint Resolution specifically imposing an estate tax upon trusts of this nature.

I find no difficulty in applying the *Hallock* doctrine to this case. We are told that "the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testa-

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[7] See particularly Commissioner v. Estate of Field, 324 U. S. 113 at 116 (1945).

[8] The two occasions were in the concurring opinions of Mr. Justice Douglas in Fidelity Co. v. Rothensies, 324 U. S. 108 (1945), and Commissioner v. Estate of Field, 324 U. S. 113 (1945). He said that the Supreme Court, in those cases, was not required to determine "whether the rule of *May v. Heiner* should survive *Helvering v. Hallock*." On the other hand, the Supreme Court has cited *Helvering v. Hallock* frequently.

[9] For an excellent discussion, see Paul, Federal Estate and Gift Taxation, 1946 Supplement, c. 7, § 7.15.

mentary dispositions not to be subjected to the same excise."[10] We need not concern ourselves with the casuistries of distinctions between contingent and vested remainders subject to divestment,[11] nor with testing the flimsiness of a reversionary string retained by the settlor.[12] In the case at bar, the corpus was to be distributed only to beneficiaries who survived the decedent. Since decedent might survive all designated beneficiaries, there was the possibility that the gift of the corpus would fail, for want of beneficiaries. He did not eliminate this possibility by an unconditional gift over. The string has exactly the same characteristics as though he had expressly reserved it. Why, pragmatically, should not the same legal effect be accorded? Is not the salient conclusion that there existed in the possession of decedent a reversionary interest which, until his death, delayed determination of ultimate possession of the corpus?

The practical effects of the majority opinion, it seems to me, can lead only to further confusion on the scope of the *Dobson* doctrine. As indicated above, the Tax Court, in Estate of Edward P. Hughes, *supra,* chose to adhere to its own interpretation of the three Supreme Court decisions. In so doing, the Tax Court specifically rejected the interpretation of the Second Circuit Court. Surely the *Dobson* doctrine cannot and should not be extended to the anomalous situation where circuit courts must accept Tax Court interpretations of law, even if such interpretations are at variance with their own.

Some controversy exists as to whether the current impasse will be resolved by the Administrative Procedure Act.[13] If the Tax Court is an "agency," and if it is subject to Section 10 of the Act, the difficulties encountered under the *Dobson* doctrine will be eliminated; for, under the Act, the appellate jurisdiction of this court is to include not only

[10] Helvering v. Hallock, 309 U. S. 106, 112 (1940). See also Goldstone v. United States, 325 U. S. 687, 690 (1945).
[11] Helvering v. Hallock, 309 U. S. 106 (1940).
[12] See Fidelity Co. v. Rothensies, 324 U. S. 108 (1945).
[13] P. L. 404, 79th Congress, approved June 11, 1946.

decision of all relevant questions of law, but also the power to set aside conclusions and findings unsupported by substantial evidence. In any event, it is my opinion that the *Dobson* doctrine has not so distrained this court as—to borrow a phrase uttered by Judge Frank in a recent dissenting opinion[14]—to bar judicial scrutiny whenever the Tax Court has ceremoniously woosh-wooshed.

For the reasons stated, I believe the decision of the Tax Court should be reversed.

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[14] Old Colony Bondholders v. N. Y., N. H., & H. Railroad Co., —— F. 2d —— (C. C. A. 2, decided January 13, 1947).

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ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC.,

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT.

The Government in its Memorandum has joined in the Petition for a Writ of Certiorari with respect to two of the four questions presented (Petition, p. 5), namely, the question (III) relating to *Dobson* v. *Commissioner*, 320 U. S. 489, and the question (IV) as to the inclusion in the gross estate of a decedent property in which his only interest, if any, was a possibility of reverter by operation of law (Memo., pp. 7-8). The Government is entirely silent as

to the question (II) involving the conflict of the decision of the Circuit Court of Appeals in the instant case with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339. It, however, specifically takes issue with Petitioners as to the necessity for review of the question (I) raised by the holding below that a possibility of reverter existed in favor of decedent under Illinois law, and attempts to support the decision of the Circuit Court of Appeals as to local law on this point (Memo., p. 8, *et seq.*).

Discussion.

The decision of the Circuit Court of Appeals that such an interest existed was based on its holding that the remainder interests in the instant case were not vested. In so doing, the court relied upon *Klein* v. *U. S.*, 283 U. S. 231, involving altogether different provisions which render that case readily distinguishable, and refused to consider the Illinois decisions cited by the taxpayer involving testamentary trusts on the obviously untenable ground that they were not applicable to *inter vivos* instruments.

Undoubtedly conscious of the error of the Circuit Court of Appeals in this regard, the Government now endeavors to sustain the decision on grounds not previously asserted. Having conceded on oral argument before the Circuit Court of Appeals that the remainders created by the trust in the instant case were vested, the Government now cites, without expressly retreating from such concession (Memo., p. 8) *Routt* v. *Newman*, 253 Ill. 185, as indicating that the settlor may have retained a reverter interest. We are, however, at a loss to see the applicability of that case which involved a provision of a trust which required income payments to be made to beneficiaries "in person and into their hands" thus obviously requiring the continued existence of

the recipient. No such language appears in the Spiegel Trust. Indeed, even a broader restraint than is involved here did not prevent the remainder interests from vesting in the *Reinecke* case, *supra*.[1] A spendthrift clause does not render remainders contingent which are otherwise vested. *McArthur* v. *Scott*, 113 U. S. 340, 381, cited with approval in *Thomas* v. *Stoakes*, 328 Ill. 115, 121, and *Pingrey* v. *Rulon*, 246 Ill. 109, 119-120.

The Government's further comment (Memo., p. 8) that we have submitted no authority for the argument "that a vested remainder subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman when the divesting condition occurs" misstates our position. The divesting condition provided in the instant case is a remainderman's death before that of the settlor leaving other remaindermen surviving him and settlor who take by way of substitution. Only if this divesting contingency occurs does the initial remainderman lose his interest. Otherwise his interest is not divested and it passes to his legatees or next-of-kin. In no event would divestment result in the retention of any interest by the settlor. The authorities cited by us fully support these propositions (Petitioners' Brief, p. 18, *et seq.*), but were disregarded by the Circuit Court of Appeals.

The Government's argument (Memo., p. 9) that there is no practical difference between a contingent remainder and a vested remainder subject to divestment (citing *Knight* v.

1. Article Sixth of each of the trusts involved in that case provided: (See Reinecke Record, pp. 7, 21, 29, 36, 44):

> "Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law * * *."

Pottgieser, 176 Ill. 368, 376) has been emphatically rejected by the Supreme Court of Illinois.[2]

Further, the Government erroneously states (Memo., p. 10), that the Tax Court made no determination as to the non-existence of a possibility of reverter by operation of law. The Tax Court expressly held, however (R. 129):

> "We are of opinion that this determination of the Commissioner must be reversed, on the authority of Reinecke *vs.* Northern Trust Co., 278 U. S. 339; Commissioner *vs.* Estate of Flora W. Lasker, 141 Fed. (2d) 889. *The decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion*, and hence the doctrine of Helvering *vs.* Hallock, 309 U. S. 106, and numerous decisions deriving from it, are not in point." (Italics ours.)

We submit that this is a definite ruling that the settlor retained no interest by operation of law or otherwise.

There is therefore present the problem suggested by the Government (Memo., p. 10) whether this court should prefer the view of the Tax Court concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced. The choice is clear since the latter court has ignored well settled rules of Illinois property law. We submit that just as in many other cases,

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2. In discussing such statement from the *Knight* case the court stated in *Warrington* v. *Chester*, 294 Ill. 524, 528-29:

> "The statement * * * that 'a fee in the remainder, subject to be divested by the death of the person seized prior to the death of the life tenant, is not for any practical purpose to be distinguished from a remainder contingent upon the remainderman surviving the life tenant,' *is not a correct statement.* Such a fee has all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition. The estate may be possessed, incumbered, sold and conveyed in the same manner as a fee simple, but the executory interest created by the happening of the condition which terminates such estate cannot be defeated." (Italics ours.)

in which this Court in dealing with important federal tax questions has found it necessary to consider local property law, it should, in order to do complete justice, now consider all the questions presented in the Petition herein.

Moreover, as we have heretofore shown (Petitioners' Brief, p. 22), there is no substantial difference between the trusts involved in the *Reinecke* case and the trust involved in the instant case. Both cases involve Illinois law and the decision of the Circuit Court of Appeals in the instant case cannot be reconciled with *Reinecke*. Indeed the Government in its Memorandum has not even attempted any such refinement, and by its silence can be considered as having acquiesced in review of this question (II).

Conclusion.

The Circuit Court of Appeals in failing to follow the controlling Illinois decisions has caused to be included in decedent's gross estate property in which he had no interest whatsoever, with resulting substantial tax liability. Justice demands that the important question of local law in issue be reviewed together with all other phases of the controversy submitted herein, and that the writ be granted without limitation.

Respectfully submitted,

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Attorneys for Petitioners.

Chicago, Illinois,
April 23, 1947.

SEP 29 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 52 . 3 .

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 52.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the Tax Court (R. 126) is not officially reported. The opinion of the Circuit Court of Appeals (R. 151) is reported in 159 F. 2d 257.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159) and rehearing denied on January 23, 1947 (R. 201). The Petition for Certiorari was filed on March 21, 1947 and the Writ granted on April 28, 1947 (R. 211). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). Respondent, Commissioner of Internal Revenue, asserted a deficiency in estate taxes due from the Executors of decedent's estate (Petitioners here) in the sum of $454,788.58 (R. 8). Substantially all of the alleged deficiency arose out of inclusion by Respondent in the gross estate of decedent of $1,140,606.30, being the value, at date of death, of property held under a trust created by decedent in 1920 (R. 9). Respondent claimed (R. 29) that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

In 1920, decedent, a resident of Illinois, transferred certain securities to trustees, also residents of Illinois, by a written trust instrument (R. 25). The trust (R. 86-7)[1] provided for payment of income equally to or for the benefit

[1] The salient provisions of the trust also appear in footnote 2 to the opinion of the Circuit Court of Appeals (R. 151-2).

of decedent's three named children during decedent's lifetime. Upon decedent's death, corpus of the trust was to be divided equally among the same three children. If, however, any of the children died leaving surviving children, the surviving children of a deceased child (grandchildren of decedent) would receive the share to which their parent would have been entitled, and, if any of the three children died leaving no surviving child, the deceased child's share would go to any other living named children and descendants of any other deceased child, *per stirpes*.

No provision was made for reversion of trust property to decedent or his estate under any circumstances, nor any express provision for any disposition if decedent outlived his three named children and their descendants.

Decedent retained no power to alter, amend or modify the trust and no power of appointment.

Only taxability of corpus is in question (R. 129) and contemplation of death is not involved (R. 26).

At the creation of the trust decedent was 47 years old and a widower. The three children, named in the trust, were his only children and were then 23, 15 and 13 years of age, respectively (R. 25). Decedent died more than 20 years later, aged 68 years and without remarrying, survived by the three named children who were then 44, 36 and 34 years, respectively, and by three grandchildren (children of a living daughter of decedent) who were then 10, 4 and 2 years (R. 25).

During the lifetime of decedent, income of the trust was paid to, or used for the benefit of, the three children (R. 25). Upon decedent's death, the three named children received the corpus of the trust in equal shares (R. 26).

The attorney, who drew the trust, testified (R. 34-5) that decedent, on several occasions prior to the drafting of the

instrument, had stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children, and wanted at no time to have any interest or title therein. The attorney further testified that, in drafting the trust, he had endeavored to carry out those instructions and believed he had done so.

Respondent's evidence (R. 35-6) showed that, on an actuarial basis, there were, at the time the trust was created, less than 17 chances in 1,000 that decedent would survive his three children, and that the then value of any possibility of decedent getting back the trust property, provided he survived his three children, was less than $4,500, based on a value in excess of $1,140,000 at date of death. Petitioners' evidence (R. 32) was that, at the date of decedent's death, there were less than 16 chances in 100,000 that he would survive his three children and three grandchildren, and that the then value of any possibility that decedent would reacquire the trust property, in the event he survived his three children and three living grandchildren, was less than $85. This actuarial evidence was not questioned and the Tax Court's Findings of Fact adopted it (R. 128-9).

Petitioners did not include any part of the value of the trust estate in the gross estate returned for estate taxes (R. 26). Respondent, however, increased the value of the gross estate, as returned, by $1,151,189.21 (of which $1,140,606.30 represented the value of corpus of the trust, R. 9, 26), and, on that account, asserted an estate tax deficiency of $451,788.58 (R. 8).

Petitioners petitioned the Tax Court for a redetermination of the deficiency and, in addition, claimed a refund of $4,400 by reason of additional administration expenses—Executors' fees paid (R. 3-5). The Tax Court held that decedent had retained no "string or tie" amounting to a

possibility of reversion, and, on the authority of *Reinecke v. Northern Trust Company*, 278 U. S. 339 (1929), determined that no part of the corpus of the trust was includable in the gross estate of decedent (R. 129). The Tax Court decided, further, that (R. 133) Petitioners were entitled to a refund of $2,423.95 after taking into account a deduction of $20,000 for Executors' fees paid and not deducted in the return and increases in gross estate not questioned (R. 104-5, 132).

Thereafter, Respondent petitioned the Seventh Circuit Court of Appeals to review the decision of the Tax Court (R. 134). The Court of Appeals reversed the Tax Court, and, in its opinion, found that the entire value of corpus of the trust estate should have been included in the gross estate of decedent. It held that the children's interests in corpus were contingent remainders (R. 153-4) and therefore "there was a possibility of the trust failing and the property returning to the settlor" by operation of Illinois law and that, for that reason, "the corpus had not completely passed from the settlor" (R. 157). The Court of Appeals' judgment (R. 159) took no account of the deduction for Executors' fees, to which it was stipulated (R. 26) Petitioners are, in any event, entitled (R. 131-2).

Petitioners petitioned for a Writ of Certiorari, which was granted (R. 211).

ASSIGNED ERRORS INTENDED TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

(2) In failing to hold that no part of such value was properly includable in decedent's gross estate.

(3) In holding that there should be included, in decedent's gross estate, property in which decedent had no interest.

(4) In holding that decedent had any possibility of reverter in the trust property by operation of Illinois law.

(5) In reversing the decision of The Tax Court of the United States.

(6) In failing to hold the decision of The Tax Court of the United States to be conclusive.

STATUTE INVOLVED.

Section 811(c) of the Internal Revenue Code:

"**§ 811. Gross estate.**

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) Transfers in contemplation of, or taking effect at death.

To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

* * * * *

(26 U. S. C., 1940 ed., Sec. 811.)

QUESTIONS PRESENTED.

I. Whether, at the death of decedent, he or his estate retained any possibility of interest in the corpus of the trust by operation of Illinois law.

II. Whether *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, is controlling.

III. Whether, even if decedent had a possibility of reverter by operation of Illinois law, the trust was a transfer intended to take effect in possession or enjoyment at or after the decedent's death, within the meaning of Section 811(c) of the Internal Revenue Code, in view of the remoteness of any such possibility and the absence of any intent to retain any interest therein.

IV. Whether, under *Dobson* v. *Commissioner*, 320 U. S. 489, the Tax Court's decision for Petitioners must stand.

SUMMARY OF ARGUMENT.

I.

The trust corpus is not includable in gross estate since decedent retained no express right of reversion and had no possibility of reverter by operation of the governing Illinois law.

(See pp. 14-29, *infra*.)

Under Illinois law, there can be no possibility of reverter by operation of law after a *vested* remainder, but the grantor of a *contingent* remainder may retain a reversionary interest. Accordingly, it cannot be determined whether decedent retained any possibility of reverter by operation of law without first determining whether the remainders were vested or contingent.

The remainders, here, vested in interest in the three named children of the decedent immediately. Therefore, a child's vested interest would pass to the child's legatees or next-of-kin if a child died prior to decedent's death. Those legatees or next-of-kin would take possession of the remainder upon the death of decedent unless their vested interests were divested by operation of the divesting condition subsequent in exact conformity with its provisions.

In order that the divesting condition could operate, either another child of the decedent or a descendant of a child would have had to survive a deceased child. If another child or descendant *did* survive, (a) the interest of the legatees or next-of-kin of the deceased remainderman would be divested and vest in the surviving child or descendant, and (b) possession would be taken by the surviving child or descendant upon the death of decedent. If, however, another child or descendant *did not* survive

a deceased child, (i) under Illinois law the divesting condition could not operate since the exact conditions specified therein would not have occurred, (ii) there would, therefore, be no divestment, and (iii) the heirs or legatees of the deceased child would take possession upon decedent's death.

As decedent was not specified in the divesting condition as one who might take upon the death of a child, decedent could not take any interest in the corpus under any conditions whatsoever.

Respondent has conceded that the instant remainders were vested.

The Circuit Court of Appeals determined that the remainders were contingent, leaving decedent with a possibility of reverter by operation of law if he survived his children and their descendants. It reached that conclusion only by refusing to consider Illinois authorities, all of which are to the contrary. It held such authorities inapplicable because they dealt with wills and not with *inter vivos* instruments. Illinois law is, however, settled that the same rules, with respect to vesting of remainders, are applicable both to *inter vivos* documents and wills.

II.

Reinecke v. Northern Trust Company controls the instant case.

(See pp. 30-34, *infra*.)

The Tax Court decided the instant case on the authority of *Reinecke*. The terms of the *Reinecke* trust are substantially identical to those of the trust at bar. The *Reinecke* decision, like the instant case, is governed by Illinois law.

In the *Reinecke* case, the Court held that the trusts were not includable in gross estate since the settlor there had,

for all practical purposes, made an absolute gift upon the creation of the trusts. Accordingly, the fact that possession or enjoyment of the corpus of the *Reinecke* trusts could be had only at or after settlor's death did not render the trusts taxable under the applicable Revenue Act.

The *Reinecke* case has never been overruled and, on its authority, it should be held that decedent here made an absolute gift upon the creation of the trust and retained no possibility of any interest therein.

III.

Even if the court should hold that Spiegel did retain a remote possibility of reverter by operation of law, it should, nevertheless, reverse the Circuit Court of Appeals and affirm the Tax Court.

(See pp. 34-46, *infra*.)

This Court has never decided that, or even considered whether, a possibility of reverter *by operation of law* will, alone, render trust corpus taxable under Section 811(c) of the Internal Revenue Code.

That Section requires the inclusion in gross estate of property transferred by a transfer *intended* to take effect in possession or enjoyment at or after death. The word "intended" must be given meaning. Just as a gift in contemplation of death is one in which anticipation of death is the governing motive, so a transfer intended to take effect at or after death is one made with the design or purpose that it take effect, not immediately, but only at or after death. Provisions with respect to transfers in contemplation of death and transfers intended to take effect in possession or enjoyment at or after death are set out in the same subsection of Section 811 and are included in the same category.

The evidence is clear that decedent intended to make an immediate and absolute transfer. The Tax Court determined that he retained no "string or tie."

Whether a transfer is intended to take effect at death is a question of fact for the Tax Court and the Tax Court so treats the question. Respondent and the Circuit Court of Appeals, on the other hand, have carried this Court's *Hallock* decision to absurd lengths and have, contrary to the provisions of the statute, disregarded intent of the transferor.

The Tax Court correctly decided that decedent intended an immediate transfer and, accordingly, Section 811(c) does not apply thereto.

IV.

Under Dobson v. Commissioner, the Tax Court's decision should have been affirmed by the Circuit Court of Appeals.

(See pp. 46-52, *infra*.)

The Tax Court's decision was fair and reasonable and decided no general principle of law but only the instant case. Respondent concedes that the instant case involves only its own facts and no general principle of law. Therefore, unless this Court holds that decedent retained a possibility of reverter by operation of law, and, further, that every such possibility renders a transfer in trust taxable, as a matter of law, under Section 811(c), regardless of remoteness or intent, the question of intent of decedent is a question of fact to be determined by the Tax Court and its determination must stand.

The Tax Court decided the instant case on the authority of *Reinecke v. Northern Trust Company*. Its decision must have been based upon a determination that the facts in the instant case were substantially the same as the

Reinecke facts. The Circuit Court, in reversing the Tax Court, must have determined that the facts in the instant case were substantially different from those in the *Reinecke* case. It, therefore, differed from the Tax Court on a question of fact or, in any event, of mixed law and fact, as to which the Tax Court's determination is conclusive.

The *Dobson* decision, accordingly, required the Circuit Court of Appeals to affirm the Tax Court.

ARGUMENT.

I.

Under Illinois Law, Decedent Retained No Possibility of Interest in the Trust Property. The Trust Corpus Was, Therefore, Not Includable in His Gross Estate for Tax Purposes.

It will be conceded that, if, at decedent's death, he had neither any interest or possibility of interest in trust corpus (it having been stipulated, R. 26, that the trust was not created in contemplation of death), the corpus was not includable in his gross estate under Section 811(c). See Estate Tax Regulations 105, Sec. 81.17.

Decedent, upon creation of the trust, transferred all interest in corpus to his named children, and such interest was inheritable by their legatees or next-of-kin. By the terms of the trust, decedent's children were given vested remainders in corpus, and, although those remainders were subject to possible defeasance by a condition subsequent, defeasance could operate only to shift interests in the corpus among the children and their children. In no event could *decedent* regain the corpus either by defeasance of the vested remainders pursuant to the terms of the trust or by operation of Illinois law or otherwise.

Illinois property law governs the question of possibility of reverter.

Decedent, here, did not *expressly* reserve any rights or possibility of rights in the trust property. Accordingly, whether he had any possibility of interest therein

depends solely upon whether Illinois property law would operate to give him an interest under any circumstances. *Blair* v. *Commissioner*, 300 U. S. 5, 9-10 (1937); *Helvering* v. *Stuart*, 317 U. S. 154, 161-2 (1942).

The Tax Court decided this case by correctly applying Illinois law to the facts. The Circuit Court of Appeals did not follow local law, and refused even to consider the controlling Illinois decisions, erroneously holding that cited authorities, respecting construction of testamentary remainders, had no application to *inter vivos* trusts. See pp. 27-29, *infra*.

The existence of a right of reverter by operation of Illinois law depends upon whether the remainder is vested or contingent.

As the children took *vested* remainders under the trust, the corpus could not possibly revert to the decedent by operation of law. If the remainders had been *contingent*, however, the decedent would have had a remote possibility of reverter.

Under Illinois law (as well as law generally), the grantor of a *vested* remainder cannot retain any possibility of reverter by operation of law. Upon the death of a vested remainderman before termination of the preceding estate, his vested interest passes under the *remainderman's* will or as his intestate property. See pp. 21-22, *infra*. The interest, thus acquired by a vested remainderman's legatees or next-of-kin, cannot be divested by a condition subsequent unless the exact contingencies, specified in the condition, occur. See pp. 22-25, *infra*. There could, therefore, have been no divestment under the Spiegel trust unless a child had predeceased Spiegel, leaving another child or grandchild surviving, in which event the interest of the legatees or next-of-kin of the deceased child would

have been divested and the surviving child or grandchild would have taken. As decedent was not named in the divesting condition, he could not possibly have taken the corpus through either operation or failure of the condition subsequent.

The grantor of a *contingent* remainder, however, can retain a reversion, and, accordingly, may have a possibility of reverter by operation of Illinois law. In the event the grantor dies, his reversionary interest in a contingent remainder passes under the grantor's will or to his next-of-kin. *Gehlbach* v. *Briegel*, 359 Ill. 316, 320 (1935); *Matthews* v. *Andrews*, 290 Ill. 103, 105 (1919); *Belding* v. *Parsons*, 258 Ill. 422, 426 (1913).

Accordingly, it cannot be determined, under Illinois law, whether the grantor of a remainder retains a possibility of reverter by *operation of law* (not by express provision) without first determining whether the remainder is vested or contingent. The determination necessarily involves technicalities of Illinois property law. However, this Court must make the determination before it can find that a possibility of reverter did or did not exist at decedent's death, for, as it said in *Helvering* v. *Stuart*, *supra*, 317 U. S. at p. 161:

> "When Congress fixes a tax on the possibility of the revesting of property * * *, the 'necessary implication' * * * is that the possibility is to be determined by the state law."

While the Court has stated that it will not decide tax liability under Section 811(c) on the basis of niceties of conveyancing,[2] each of the decisions in which the statement was made (unlike the instant case) involved a trust containing an *express* provision for a reverter under cer-

[2] *Helvering* v. *Hallock*, 309 U. S. 106 (1940), *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 (1945), and *Commissioner* v. *Field*, 324 U. S. 113 (1945).

tain contingencies to, or for a testamentary power of appointment by, the grantor. None of the decisions required consideration of, or considered, a possibility of reverter *solely by operation of law.*

Respondent urges that the trust property, in the case at bar, is taxable only because decedent retained a possibility of reverter by operation of Illinois law. Respondent's contention can be sustained, if at all, only if the Court determines that the remainders created by the Spiegel trust were contingent remainders. But if the trust remainders were, and they admittedly were (see p. 20, *infra*), vested remainders, then, by virtue of their vested character, decedent had no possibility of reverter therein under any circumstances whatever.[3]

The remainders were vested.

There can be no doubt that the remainders, set up by the instant trust, vested under Illinois law in Spiegel's children upon the creation of the trust and continued vested throughout decedent's life. The fact that they were subject to divestment did not change their vested character.

In *Lachenmyer* v. *Gehlbach*, 266 Ill. 11 (1914), the testator left his residuary estate, both real and personal, to his wife for life and, upon her death the property was

> (p. 13) "to go to my children, share and share alike, and shall any of my children die, then the children of such deceased child, should any children be surviving such deceased child, to take the share of the parent

[3] See Paul, Federal Estate and Gift Taxation—1946 Supplement—p. 194, *f.n.* 162: "At first blush, it seems sufficiently safe to give the ultimate taker a vested remainder * * *." See also, *idem*, p. 199 to the effect that *May* v. *Heiner*, 281 U. S. 238 (1930) "assumed that the vested remainders were fully and completely the property of the designated takers."

so deceased; and should any of my children die leaving no issue, then the share of such deceased child shall be divided equally among my surviving children.'"[4]

The court held (pp. 23-4) that the testator's children took vested interests, subject to divestment by an executory limitation.

In its opinion, the court quoted (p. 19) from Gray, The Rule Against Perpetuities, Section 108 (the identical statement being found in the Fourth Edition—1942—Sec. 108 at pp. 95-6), as follows:

"'If the conditional element is incorporated into the description of or into the gift to the remainderman then the remainder is contingent, but if, after words giving a vested interest, a clause is added divesting it the remainder is vested. *Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death.* But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent.'" (Italics ours.)

The court concluded that:

(p. 19) "The application of that rule to this case will fix the remainder as vested in the children of the testator. * * *"

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[4] Compare the Spiegel trust which provided (R. 87):

"Upon my death, the said Trustees * * * shall divide said trust fund * * * equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled; and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine * * *."

Lachenmyer v. *Gehlbach* cites a wealth of earlier Illinois authorities to the same effect. It has been consistently followed. See *Welch* v. *Crowe*, 278 Ill. 244 (1917); *McBride* v. *Clemons*, 294 Ill. 251 (1920); *Warrington* v. *Chester*, 294 Ill. 524 (1920); *Boye* v. *Boye*, 300 Ill. 508 (1921); *Smith* v. *Shepard*, 370 Ill. 491 (1939); *Danz* v. *Danz*, 373 Ill. 482 (1940); *Murphy* v. *Westhoff*, 386 Ill. 136 (1944); *Stombaugh* v. *Morey*, 388 Ill. 392 (1945); and *Freudenstein* v. *Braden*, 397 Ill. 29 (1947).[5]

The fact that, as in the instant case (R. 86), the remaindermen received immediate gifts of income is further evidence that the remainders were vested. *Armstrong* v. *Barber*, 239 Ill. 389, 400 (1909); *Bush* v. *Hamill*, 273 Ill. 132, 135 (1916); *Hoblit* v. *Howser*, 338 Ill. 328, 332 (1930). The Circuit Court of Appeals, however, ignored these Illinois cases and, without citation of any authority, erroneously held (R. 157) that the gift of income was "not persuasive as to whether the settlor had completely disposed of the corpus."

Illinois law favors a construction of both wills and *inter vivos* deeds, which will vest remainders unless a contrary intent is "clearly and expressly indicated." *Wyeth* v. *Crane*, 342 Ill. 545, 550 (1931). Further, Illinois

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[5] The Restatement of the Law of Trusts is in accord with the Illinois rule, stating in Section 129(*b*), that:

"The interest of the beneficiary may be a future interest either vested or contingent.

Illustrations:

. . . . . .

2. A transfers $100,000 to B in trust to pay the income to C for life and on C's death to pay the principal to D but if D dies before C then to pay the principal to E. C, D and E are beneficiaries of the trust, D having a vested future interest and E a contingent future interest."

In the illustration, "D" would designate the decedent's three named children and "E" would represent the persons specified in the divesting condition to take in the event a named child died before the decedent.

See also, *McArthur* v. *Scott*, 113 U. S. 340, 380-1 (1885).

courts make no distinction, so far as vesting is concerned, between trusts of real and of personal property. *Winterland* v. *Winterland*, 389 Ill. 384, 388 (1945).

Respondent concedes that the remainders were vested.

At the oral argument in the Circuit Court of Appeals, counsel for Respondent conceded that the remainders in the case at bar were vested.

Thereafter, in his Memorandum (filed in reply to the Petition for Certiorari), Respondent said (p. 8) that *Lachenmyer* v. *Gehlbach, supra,* "would seem to indicate that the remainder interests under the trust created by the decedent were vested." However, Respondent argued (p. 9) that "the Supreme Court of Illinois has several times stated that the question whether a remainder is contingent or vested subject to divestment by the death of the remaindermen prior to the death of the life tenant is not of importance, because for all practical purposes they are the same," and cited *Knight* v. *Pottgieser,* 176 Ill. 368, 376 (1898) and *Cummings* v. *Hamilton,* 220 Ill. 480 (1906). Respondent apparently overlooked the subsequent statement of the Illinois court in *Warrington* v. *Chester,* 294 Ill. 524 (1920), where, referring to its *Knight* v. *Pottgieser* decision, the court said:

> (pp. 528-529) "The statement in the opinion that 'a fee in the remainder, subject to be divested by the death of the person seized prior to the death of the life tenant, is not for any practical purpose to be distinguished from a remainder contingent upon the remainder-man surviving the life tenant,' *is not a correct statement.* Such a fee has all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition." (Italics ours.)

The remainders vested in interest immediately.

The instant remainders vested in *interest* upon creation of the trust in 1920. *Hickox* v. *Klaholt*, 291 Ill. 544, 548 (1920); *Fleshner* v. *Fleshner*, 378 Ill. 536, 538-40 (1942). See also, *Shukert* v. *Allen*, 273 U. S. 545, 547 (1927); *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 346 (1929); *Molter* v. *Commissioner*, 69 F. 2d 7, 9 (CCA 7th, 1934); *Hopkins* v. *Commissioner*, 69 F. 2d 11, 12 (CCA 7th, 1934), certiorari denied 293 U. S. 560.

Since the remainders vested in interest upon creation of the Spiegel trust, the gifts were in no sense ambulatory and had none of the characteristics of a testamentary disposition.

A vested remainder passes by will or intestacy on the death of the remainderman. It cannot revert to the grantor in the absence of an express provision therefor.

Since the remainders were vested, if a child (remainderman) had died before the decedent, the child's remainder *interest* would, on the child's death, have passed under his will or to his next-of-kin as his intestate property.[6]

Thus, in *Smith* v. *West*, 103 Ill. 332 (1882), Allan conveyed property to Mrs. West for life with remainders after her death. The court, holding that the remainders vested upon delivery of the deed, said:

(p. 337) "It is urged that Allan's deed to Mrs. West only having conveyed a life estate to her, and a remainder to the children of her body, *or such a*

[6] If a child had died before the death of decedent, the value of the child's vested *interest* in corpus would have been included in the child's gross estate for estate tax purposes. See *Kinney's Estate* v. *Commissioner*, 80 F. 2d 568, 569-572 (CCA 9th, 1935); *Frazer's Estate* v. *Commissioner*, 162 F. 2d 167, 168 (CCA 3d, 1947).

might be living at her death, or the descendants of any one that might be then deceased, the fee remained in him or his heirs until her death, and the fee would not vest in the remainder-man until the life estate should be expended, and hence the remainder was contingent. We do not so understand the rule. We understand it, that when a conveyance of the particular estate is made to support a remainder over, the tenant for the particular estate takes it, and *if the remainder-man is in being, he takes the fee.* In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainder-man on the delivery of the deed. *The title thus vested becomes an estate of inheritance, and in case the remainder-man dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise.*" (Italics ours.)

Lachenmyer v. *Gehlbach, supra,* 266 Ill. at p. 19, approved *Smith* v. *West* and is to the same effect. See also, *Baley* v. *Strahan,* 314 Ill. 213, 215, 220 (1924) (cited in *Klein* v. *United States,* 283 U. S. 231, 234); Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed., Secs. 93, 94, 327; Gray, The Rule Against Perpetuities, 4th ed., Sec. 101; Restatement of the Law of Trusts, Sec. 411 (*l*).

The divesting condition subsequent added nothing to decedent's possibility of interest. The condition could divest only in favor of the other children or descendants specified therein and not in favor of decedent who was not named in the condition.

The children's remainders having vested immediately, the corpus, in the event of their deaths before Spiegel, would have been taken by their heirs or next-of-kin, unless their heirs or next-of-kin were divested pursuant to the specific terms of the divesting condition subsequent. If

divestiture were to occur under the condition subsequent—that is, if the condition were to operate—exact and complete compliance with the condition would have been required under Illinois law. *Illinois Land & Loan Co.* v. *Bonner*, 75 Ill. 315, 326-7 (1874); *Henderson* v. *Harness*, 176 Ill. 302, 309 (1898); *McFarland* v. *McFarland*, 177 Ill. 208, 217 (1898); *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110, 115-6, 127 (1941).

The divesting condition was twofold (R. 87). If it were to operate at all, a child would have had to die before the decedent either

> (*a*) "leaving a child or children surviving," in which case the deceased child's "child or children" (grandchildren of the decedent) would receive the deceased child's share, or
>
> (*b*) "without leaving any child him or her surviving," in which case his or her share would go to decedent's "remaining children, and the descendants of any deceased child" of decedent.

Thus, if divestiture were to occur under the first part (*a*) of the condition, a child or children of the deceased child (grandchildren of the decedent) would have had to survive the deceased child. If, however, no child survived the deceased child, the first part of the condition could not operate, and the remainder of the deceased child would, so far as the first part was concerned, remain the property of his legatees or next-of-kin. There could, nevertheless, be divestment through operation of the second part (*b*) of the condition, for, by hypothesis, the child would have died "without leaving any child or children him or her surviving." But, in that event, the second part of the condition would require the property to go to decedent's "remaining children, and the descendants of any deceased child." Unless there were other children or grandchildren, who survived the deceased child, the second part of the condition

would also fail, leaving the vested remainder of the deceased child unaffected and to be taken by those designated in his will or by the laws of intestacy. See Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed., Secs. 596-7.

If the divesting condition operated—if a descendant of a deceased child or other children of Spiegel survived a deceased child—the interest of the deceased child would, through divestiture, immediately vest in his children or other children of Spiegel, subject to no divestment under any conditions.[7] The divesting condition, however, made no provision for Spiegel taking any interest thereunder and could not operate for his benefit under any conditions. Spiegel could not, therefore, take under the trust regardless of any contingencies which might occur.

The Illinois rule (that divesting conditions operate only if the exact contingencies specified occur) is, likewise, the law in other jurisdictions. Thus the court stated in *White* v. *Smith*, 87 Conn. 663, 675-6, 89 Atl. 272, 276 (1914):

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[7] The divesting clause is susceptible of being construed to require a child or descendant, who may take the share of a deceased child, either (i) to survive both the deceased child and Spiegel, or (ii) to survive only the deceased child. Under either construction divestment could be only for the benefit of persons other than decedent. However, if required to survive only the deceased child, then, even if decedent had had a possibility of reverter by operation of law, nevertheless, the corpus would not be includable in decedent's estate under Sec. 81.17 of Regulations 105, as it would then not be necessary for the substituted beneficiaries to survive decedent. Respondent, in his Reply Brief filed in *Commissioner* v. *Church's Estate*, 161 F. 2d 11 (CCA 3d, 1947), said:

> (p. 5) "In our main brief * * * we distinguished cases such as *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 * * * and *Frances Biddle Trust* v. *Commissioner*, 3 T. C. 832, on the ground that there the beneficiaries could take the property without regard to the grantor's death and in the circumstances death could not have enough effect upon the ultimate possession or enjoyment of the property to justify the tax. The Government is no longer asserting the tax in that type of case."

"The condition is that those living at the time of the termination of the life tenancies shall take as substitutionary donees. If there are none living at that time, there is nobody to fill the role of substitutionary donee, and the substitutionary gift necessarily fails, leaving the original gift vested in interest unaffected."

See also, *Ricardo* v. *Kelly*, 48 Atl. 2d 897 (Sup. Ct. N. J., 1947); *Noble* v. *Birnie's Trustee*, 105 Md. 73, 65 Atl. 823 (1907); *In Re McCombs' Estate*, 261 App. Div. 449, 25 N. Y. S. 2d 894 (1941), affirmed 287 N. Y. 557, 38 N. E. 2d 226 (1941); *Harrison* v. *Foreman*, 5 Ves. Jun. 207, 210, 31 English Reports, Full Reprint, 549, 551 (1799); *Sturgess* v. *Pearson*, 4 Madd. 411, 56 English Reports, Full Reprint, 757 (1819).

Accordingly, from the time the trust was created until the corpus was distributed at decedent's death, decedent had no interest in the trust property and no possibility of acquiring any interest under the trust by divestment, by reverter or otherwise.[8] The fact that the remainders were vested negated any possibility of reverter to decedent by operation of Illinois law. He could retain no reversion after a vested remainder. He could not take upon divestment, pursuant to the divesting condition subsequent, since he was not specifically named therein as a beneficiary of divestment.

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[8] In the event that all decedent's children and children's descendants had predeceased him, decedent could, of course, have acquired an interest in the trust corpus either under the wills of his children or their descendants or as one of their next-of-kin. This possibility (of taking, not under the trust, but under the wills or as a next-of-kin of beneficiaries) does not render the trust property taxable under Section 811(c). See *Commissioner* v. *Estate of Singer*, 161 F. 2d 15, 18, *f.n.* 5 (CCA 2d, 1947); *Commissioner* v. *Hall's Estate*, 153 F. 2d 172, 174 (CCA 2d, 1946). See also, Paul, Federal Estate and Gift Taxation—1946 Supplement—p. 194, *f.n.* 162.

Respondent misconceives Petitioners' argument.

Respondent in its Memorandum in reply to the Petition for Certiorari, however, states (p. 8) that:

> "* * * none of the decisions cited by petitioner supports its contention that a vested remainder, subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman *when* the divesting condition occurs. Indeed, *Routt* v. *Newman*, 253 Ill. 185, approved and relied upon in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447, looks the other way, and affords substantial confirmation for the view of the court below that *upon divestiture of the remainder interests and failure of the gifts over*, the trust corpus would have reverted to the decedent." (Italics ours.)

Respondent misunderstands Petitioners' position. Upon the death of a vested remainderman, his remainder *interest* passes, immediately, to his legatees or next-of-kin, subject, to being divested from the legatees or next-of-kin upon the occurrence of the divesting condition subsequent in exact accordance with its terms. In the instant case, there could not be both "*divestiture*" of the remainder interests and "*failure of the gifts over.*" If the divesting condition occurred, the *gifts over* would not fail. Both the condition and the gifts over would, in that event, operate and the beneficiaries of the gifts over (other children or descendants of children of the decedent but not decedent) would take. If there were no other children or descendants of children surviving the deceased child, the *divesting condition* would fail (would not operate), since it could operate only in exact conformity with its express conditions, that is, only if persons specified in the divesting condition were alive. In that event, there would be no divestiture and no gifts over and the legatees or heirs of the deceased vested remainderman would take.

Routt v. *Newman*, 253 Ill. 185 (1912), cited by Respondent in his Memorandum, has no bearing on the case at bar. The *Routt* decision is explained in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447 (1946) (also cited by Respondent), as follows:

> (p. 465) "A like question was presented to this court in *Routt* v. *Newman*, 253 Ill. 185. * * * The question presented was the disposition to be made of the portion of the *income* payable to the child of the deceased beneficiary, upon the death of such child, *during the continuance of the trust.* * * * It was held that the portion of the *income* which the grandchild was receiving at the time of his death, *not having been disposed of by the testatrix beyond the lifetime of such grandchild,* was intestate property which descended to the heirs of the testatrix." (Italics ours.)

No question of divesting was involved in the *Routt* case; the income there had been given only during the grandchild's life. In the instant case, however, the corpus was, by reason of the vested character of the remainders, completely disposed of upon the creation of the trust.

Opinion of Circuit Court of Appeals.

The Circuit Court of Appeals determined that the Spiegel remainders were contingent, notwithstanding Respondent's concession in open court and settled Illinois law that they were vested. It reached its conclusion by frankly ignoring all authorities cited by Petitioners (and Respondent cited none) on the question of vesting because, said the Court of Appeals, those authorities dealt with remainders under wills and are, therefore, not applicable to *inter vivos* trusts (R. 153).

However, vesting is always a question of intention. See *Murphy* v. *Westhoff*, *supra*, 386 Ill. at pp. 140-1. Accordingly, the law of Illinois is clear that the same rules

of construction must be applied to determine intent of a settlor of an *inter vivos* trust as of a testator. Thus, in *Harder* v. *Matthews*, 309 Ill. 548 (1923), it was necessary to decide whether a remainder, set up by an *inter vivos* deed, was vested or contingent. The remainder was after a life estate reserved to the grantor and was subject to divestment upon death of the remainderman before the grantor. The court followed *Lachenmyer* v. *Gehlbach*, *supra*, and held that the remainder was vested. The *Lachenmyer* case, however, had involved a trust under a will and it was argued (in the *Harder* case) that the *Lachenmyer* decision was, therefore, not applicable to a remainder created *inter vivos*. The court, however, held (p. 568) that the same rules must be applied both to wills and *inter vivos* instruments. Subsequently, in *Smith* v. *Dugger*, 310 Ill. 624, 627 (1924), the court relied upon and followed *Harder* v. *Matthews*.

The error, into which the Court of Appeals fell in the instant case, is succinctly commented on in *Cole* v. *Sewell*, 2 H. L. C. 186, 9 English Reports, Full Reprint, 1026 (1848), where the Court said:

> (p. 236 of 2 H. L. C.) "* * * there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of saying that we are not to construe a settlement or any other instrument *inter vivos* in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases; in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in case of a settlement."

The Court of Appeals' failure to consider cited authorities with respect to vesting under wills is difficult to understand since it found the Spiegel remainders to be contingent solely upon the authority of *Klein* v. *United States*, 283 U. S. 231 (1931). In its opinion (R. 154), it

referred to that portion of the *Klein* opinion, in which this Court cited *Haward* v. *Peavey*, 128 Ill. 430 (1889), and *Baley* v. *Strahan*, 314 Ill. 213 (1924), as authorities that the *Klein* remainder was contingent. The *Klein* case involved an *inter vivos* deed and both the *Haward* and *Baley* decisions construed *wills*.

In any event, there probably is no clearer example of a contingent remainder than the remainder considered by this Court in the *Klein* case, and the remainder there does not faintly resemble the vested Spiegel remainders.[9]

By determining that the remainders were contingent in the face of settled Illinois law to the contrary, the Circuit Court of Appeals was able to find that, if all the children had predeceased the settlor, leaving no children (decedent's grandchildren) who survived them, the remainders would revert to the settlor. That court's conclusion would, of course, have been correct if the remainders had been *contingent*. Under all applicable Illinois decisions, however, they were *vested* and the decedent could not take in any event. If no other children or descendants survived a deceased child, the divesting condition could not operate and the legatees or next-of-kin of the deceased remaindermen would be entitled to possession of corpus upon the death of the decedent. The *divesting condition* might fail (be inoperative) but, since the remainders were vested, the *trust* could not fail, and the corpus could not possibly revert to decedent under any circumstances.

Since decedent had no possibility of reverter or other interest in the corpus of the trust at the date of his death, that corpus was not includable in gross estate under Section 811(c).

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[9] See comparison of the *Klein* deed and the Spiegel trust, p. 31, *infra*.

II.

Reinecke v. Northern Trust Company, 278 U. S. 339, Controls the Case at Bar.

The Tax Court decided (R. 129) this case on the authority of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929).

The *Reinecke* trusts were governed by the law of Illinois and that case was decided on facts which cannot be distinguished from the instant case, so far as concerns corpus of four of the *Reinecke* so-called "five trusts."

Reinecke trusts compared with Spiegel trust.

Each of the four *Reinecke* trusts gave income immediately to persons other than the settlor. Each terminated five years after the death of the settlor, unless the named beneficiary (a child of the settlor) died prior to the end of such five years, in which event the trusts terminated upon the death of the *survivor* of the settlor and the child. Upon termination, the remainders were to be paid over to the child if he was then living, with remainders over in the event the named child was not living at termination of the trust.

The *Reinecke* settlor, just as Spiegel, gave income to third parties from inception of the trusts. The *Reinecke* trusts, just as the Spiegel trust, terminated, and the corpus thereof was distributable, at or after the settlor's death. Under the *Reinecke* trusts, just as under the Spiegel trust, the named beneficiary took possession of corpus at or after the settlor's death if he were then living, otherwise there was a gift over.

The similarity of the termination provisions of four of the *Reinecke* "five trusts" and the *Spiegel* trust, and the

utter dissimilarity of the deed in *Klein* v. *United States*, 283 U. S. 231 (the only authority on vesting relied upon by the Circuit Court of Appeals), appears from the following tabulation of their respective provisions:

Reinecke Trust[10]	Spiegel Trust[11]	Klein Deed[12]
"The trust hereby created shall terminate at the expiration of five (5) years from the death of the [settlor]; provided, however, that if the said [named child] shall die prior to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the survivor of the said [settlor] and the said [child]. And upon the termination of said trust the said trust estate shall be paid over to [the child] if he shall be then living, and if he shall not be then living" gifts over were provided.	"Upon my death, the said Trustees * * * shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died" gifts over were provided.	"* * * if she [life tenant] shall die prior to the decease of said grantor * * * she shall * * * take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor * * * such reversion being hereby reserved to said grantor and excepted from this conveyance. * * * Upon condition and in the event that said [life tenant] shall survive the said grantor, then and in that case only the said [life tenant] shall * * * take * * * the said lands in fee simple * * *"

[10] *Reinecke* Record, pp. 20, 27, 35, 43.
[11] *Spiegel* Record, p. 87.
[12] *Klein* v. *United States*, 283 U. S. at pp. 232-3.

Reinecke Trusts terminated at or after the settlor's death.

Confusion as to the terms of the *Reinecke* trusts has arisen, due to the statement in this Court's *Reinecke* opinion (p. 344) that four of the "five trusts" were

> "terminable five years after the settlor's death or on the death of the respective life tenants, *whichever should first happen*, with remainders over."

If that statement were correct, then the four trusts might have terminated upon the death of an income beneficiary during the lifetime of the settlor.

As a matter of fact, however, the four trusts terminated either (i) five years *after* the settlor's death, or (ii), if a named beneficiary died before the end of that period, on the death of the *survivor* of the settlor and the beneficiary. See p. 31, *supra*. Thus, the four *Reinecke* trusts could not terminate *prior* to the death of the settlor.

This Court did, in fact, consider the *Reinecke* trusts on the basis of their true provisions, namely, that they terminated *at or after* the settlor's death. This appears from the statement of the Court (p. 347) that the question presented was whether

> "• • • the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen *after* the testator's death, *as directed*, • • •"

is included within the taxing provisions of the applicable Revenue Act. The Court further said (p. 348) that the *Reinecke* case involved

> "• • • a life estate in one with remainder over to another *at or after* the donor's death. • • •"

This Court's decision in the Reinecke case.

The Court held that the corpus of the *Reinecke* trust was not includable in the gross estate of decedent under Section 402(c) of the Revenue Act of 1921, the provisions of which were, so far as concerns issues here, the same as those of Section 811(c) of the Internal Revenue Code. This Court said:

> (p. 346) "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
> (p. 346-7) "* * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made.
> (p. 347-8) "* * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

The *Reinecke* decision held that those *Reinecke* trusts were, under Illinois law, completed gifts when made, that the settlor retained no interest in the trust property, and that, accordingly, the trusts did not take effect at or after death. It is submitted that the Court should, on that authority, hold likewise with respect to the Spiegel trust.

The case at bar cannot be distinguished from the *Reinecke* decision. Illinois law governed the construction of the *Reinecke* trusts and governs here. The respective taxing statutes, applicable to the two cases, are substantially iden-

tical. This Court has not overruled its *Reinecke* decision and there is no subsequent decision of this Court which is inconsistent with, or requires overruling of, the *Reinecke* case.

The instant case should, therefore, be decided for Petitioners on the authority of the *Reinecke* decision.

III.

Even Though Decedent Had Retained a Remote Possibility of Reverter by Operation of Law, the Trust Corpus Would Not Be Taxable Under Section 811(c).

Decedent retained no possibility of reverter in the trust corpus, and, therefore, no part thereof was includable in his gross estate under Section 811(c).

The Circuit Court of Appeals, however, found that the trust remainders were contingent, and that, accordingly, decedent, at his death, had a remote possibility of reverter by operation of Illinois law, provided all his children and their descendants predeceased him. The court considered itself bound (by *Helvering* v. *Hallock*, 309 U. S. 106 (1940), *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 (1945), and *Commissioner* v. *Field*, 324 U. S. 113 (1945)) to hold that the mere existence of such a possibility, as a matter of law, required inclusion of the trust corpus in gross estate, regardless of intent of the decedent or remoteness of the possibility.

No decision of this Court has passed upon the taxability of a possibility of reverter solely by operation of law.

The decision of the court below was wrong. This Court has not even considered (in the *Hallock*, *Fidelity-Philadel-*

phia, Field or any other decision) whether existence of a possibility of reverter by operation of law, in the event of death of remaindermen, renders trust property taxable under Section 811(c).

It is submitted that the corpus of the Spiegel trust is not taxable, even if the Court should hold that decedent did retain a remote possibility of reverter by operation of law. Section 811(c) requires inclusion in gross estate of property conveyed by an *inter vivos* transfer "intended" to take effect in possession or enjoyment at or after the grantor's death. A transfer, therefore, does not come within the Section's purview unless it is not only (1) a transfer which takes effect at or after the transferor's death, but also (2) a transfer which is intended so to take effect.

The Hallock principle.

This Court's *Hallock* and related decisions have settled only that retention of an *express* "string or tie"—that is to say, an *express* possibility of reverter—dependent upon remaindermen dying before the settlor (or before a later date fixed with reference to the settlor's death) is, without more, sufficient to bring trust property into gross estate.[13]

Each of the trusts, there considered, provided expressly for retention of a reversionary string. There could, therefore, be no doubt of intent to retain the string. The transfers took effect at or after death by reason of retention of express possibilities of reverter. They were obviously *intended* so to take effect because the settlors expressly provided for the strings—

[13] Throughout the remaining portions of this brief, reference to a "string or tie" or "possibility of reverter" is intended to be to a string or tie or possibility of reverter, operative only if remaindermen die before the settlor or before a later date fixed with reference to settlor's death.

the possibilities—which, in and of themselves, made the transfers so take effect. The transfers, therefore, fell within the provisions of Section 811(c) as transfers *intended* to take effect at or after death.[14]

If a possibility of reverter arises solely by operation of law, intent to make a transfer to take effect at death may or may not exist.

The problem, involved in possibilities of reverter solely by operation of law, is fundamentally different. Even though it be conceded, for argument, that any retained string or tie, however remote, arising by operation of law, is sufficient to make a transfer take effect at or after death,[15] nevertheless intent that the transfer so take effect must still be found. A trust instrument, which fails to make any reference to a string or tie, does not, standing alone and in the absence of any other facts, evidence an intent to retain a string or tie by operation of law, and, thereby, to make a transfer to take effect at or after death, as is the case when the trust expressly provides for a retained tie.

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[14] See *Helvering* v. *Hallock*, *supra*, 309 U. S., at p. 110, to the effect that:

> "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which is retained, is the crux of the problem."

See also, *Helvering* v. *Proctor*, 140 F. 2d 87 (CCA 2d, 1944), where the court, referring to the *Hallock* decision, said (p. 89):

> "The settlor had provided that, if he survived his wife—who had a life estate—the remainder went to him; but if she survived him, the remainder went to her. All that was decided was that, when that was the intent, it made no difference what was the form of words used."

[15] See, to the contrary, *Estate of Francois L. Church*, 3 TCM 1300, 1301 (1944), affirmed 161 F. 2d 11 (CCA 3d, 1947), certiorari granted June 16, 1947 (#96).

Whether a transfer is "intended" to take effect at death, by reason of retention of a possibility of reverter by operation of law, is a question of fact.

In dealing with reverters by operation of law, intent to retain a "tie" is a question of fact. If the intent does not exist, then, although the transfer may take effect at or after death, nevertheless it was not "intended" so to take effect.

To argue that one always intends the legal consequences of his act begs the question. Section 811(c) covers transfers "*intended*" to take effect at or after death, and the word "intended" must be given meaning. If the ascribed meaning be "an intention to bring about legal consequences," the word has, in reality, been given *no* meaning. So construed, the Section would cover every transfer which, as a matter of law, takes effect in possession or enjoyment at or after death. So construed, every transfer, involving a possibility of reverter by operation of law, would, regardless of intent in fact, be "intended" to retain the string arising out of local property law, and, thus, "intended" to take effect at or after death. So construed, the Section would have the same meaning as if the word "intended" were deleted.

"Intended" must be given its normal meaning—namely, "with the purpose"—and the question of intent is therefore, one of fact, difficult to determine, to be sure, but determinable, nevertheless, as any other fact. See Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 191; Bohlen, Mixed Questions of Law and Fact, 72 U. of Pa. L. Rev. 111, 112. The state of a man's mind is as much a fact as the state of his digestion. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (1885). The problem, raised by possibilities of reverter by operation of law under

Section 811(c), involves more than merely determining whether a transfer took effect, as a matter of law, at or after death—whether a string or tie was, as a matter of law, retained until death. There remains for determination whether the transferor did, in fact, intend to retain the string or tie.

Section 811(c) covers transfers either "*in contemplation* of or *intended* to take effect in possession or enjoyment at or after death." It is settled that the transferor's motive must be determined before it can be ultimately held that a transfer was in "contemplation of death." *United States* v. *Wells*, 283 U. S. 102 (1931). It seems obvious that, similarly, intent or purpose must be found, in order to determine whether a transfer was "intended" to take effect at or after death.[16] As a matter of meaning of words, Webster's New International Dictionary of the English Language, Second Edition (Unabridged), defines "*contemplation*," among other things, as the "act of intending, * * * hence, intention, * * *" and "*intend*" as "to have in mind as a design or purpose."

This Court, accordingly, has held, in contemplation of death cases, that motive impelling a transfer "*is a question of fact in each case.*" See *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636 (1946). It should follow that the question of intention, in cases involving transfers intended to take effect at death, is, likewise, one of fact.

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[16] See *United States* v. *Wells*, *supra*, 283 U. S., at pp. 116-17:

"* * * The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax * * *. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive * * *."

The Tax Court requires proof of intention as a fact.

The Tax Court holds that intention to retain a possibility of reverter—a string or tie—by operation of law is a question of fact. It finds intention from the four corners of the instrument of transfer so far as practicable and, to the extent required, also from "the framework of extrinsic circumstances." See *Estate of Nettie Friedman, Deceased*, 8 T. C. 68 (1947); *Estate of Gilliat G. Schroeder*, 6 TCM 4 (1947). If a string by operation of law has been retained, there are several "extrinsic" factors which cast light upon the intention of the transferor.[17] The age of the settlor and ages and numbers of persons, who must predecease the settlor in order that he may again take the property, furnish evidence of an intent to make a transfer to take effect immediately or only at or after his death.[17] The relatively large or small value of the string sheds light.[18] Statements, made by the grantor at or about the time of execution of the trust, as in the instant case (R. 33-5), evidence his intent. See *Estate of Sallie E. Walton*, 42 B.T.A. 300, 302 (1940); *Estate of Benjamin P. O'Neal*, 6 TCM Dec. No. 15,881(M) at pp. 153-4 (1947). See also, *United States* v. *Wells*, *supra*, 283 U. S. at p. 113; *Williams* v. *Swango*, 365 Ill. 549, 556 (1937). After weighing all the evidence, the Tax Court has, in different cases, found that there was no intent to retain a string or tie, as in *Estate of Nettie Friedman, Deceased*, *supra*, and *Estate of Gilliat G. Schroeder*, *supra*, or that the decedent did intend to retain a possibility of reverter by operation of law which was subject to tax,

[17] See *Frances Biddle Trust*, 3 T. C. 832, 843 (1944):

"• • • Thus, the creation of a trust for the benefit of an aged aunt by a comparatively youthful grantor may demonstrate a totally different intent from a gift to minor grandchildren and their issue and appointees, notwithstanding that the instruments of transfer are otherwise identical."

[18] See *Estate of Ellen Portia Conger Goodyear*, 2. T. C. 885, 890-1 (1943).

as in *Estate of Thomas P. Leamon, Deceased*, 5 T. C. 699 (1945).

The Tax Court's approach is epitomized in *Estate of Nettie Friedman, supra*, where the court stated:

> (p. 71) "Under these circumstances, a reasonable view is that the decedent, the grantor, had no thought of making transfers of property *inter vivos* with the intention that the property could revert to herself or to her estate, or could take effect only at or after her death. And the circumstance that the decedent did not make any more explicit provision in the trust instrument to cover the remote contingency that all of the beneficiaries should predecease her should be regarded as having little or no significance in this case because of the extrinsic circumstances, namely, her age and the respective ages * * * of her nephews and grandnephews and nieces and grandnieces."

The Court of Claims, likewise, holds that intent to transfer property by a conveyance effective at or after death must be determined as a fact. See *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 565, 556-7 (1945).

Circuit Courts of Appeals ignore intention.

Certain of the Courts of Appeals disregard intention, holding that the mere existence of a possibility of reverter by operation of law, without more, renders a trust remainder subject to inclusion in gross estate under Section 811(c). See, *Commissioner* v. *Bank of California (Estate of M. E. Girvin)*, 155 F. 2d 1 (CCA 9th, 1946)[19]

[19] The Tax Court, in the *Girvin* case (3 TCM 1290, 1291) said:

> "* * * there is an additional issue as to the applicability of *Helvering* v. *Hallock*, 309 U. S. 106. On that score it should be sufficient to point out that the reversion to which the estate might be subject,—by operation of law and not by force of any provision of the trust itself,—could arise only upon decedent's survival of two children and five grand-

Commissioner v. *Bayne's Estate*, 155 F. 2d 475 (CCA 2d, 1946); *Commissioner* v. *Estate of Sidney M. Spiegel, Deceased*, 159 F. 2d 257 (CCA 7th, 1946). Each of these Courts of Appeals stated that it was bound so to decide by this Court's decisions in the *Hallock*, *Field* or *Fidelity-Philadelphia* cases, which dealt only with expressly reserved reverters. See also, *Thomas* v. *Graham*, 158 F. 2d 561 (CCA 5th, 1946); *Beach* v. *Busey*, 156 F. 2d 496 (CCA 6th, 1946), certiorari denied 329 U. S. 802.

Decedent here intended to make a transfer effective immediately.

The extrinsic circumstances, in connection with the instant trust, show that Spiegel intended to retain no interest in the trust property. See pp. 3-4, *supra*. The Tax Court considered evidence of these circumstances and held that he retained no interest. He, therefore, must have intended an immediate transfer and the trust corpus was not taxable under Section 811(c). No error was assigned by Respondent in the Circuit Court of Appeals with respect to admission of evidence.

Further, in the instant case, unlike the *Girvin* and *Bayne* cases, the decedent disposed of all income from the inception of the trust. This is additional evidence that he intended the transfer to take effect immediately.[20]

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children, all of whom were living upon the establishment of the trust. These circumstances make it impossible to view this transfer as intended to take effect at or after decedent's death. * * *"

The Court of Appeals, reversing the Tax Court, did not consider intent.

[20] See *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, 113 (1945).

See also, Paul, Federal Estate and Gift Taxation—1946 Supplement—pp. 192-193, to the effect that cases, involving transfers of remainders only (the settlor retaining income) are clearly distinguishable from those in which income is immediately given

Consideration of the state of the law in 1920, when the instant trust was created, likewise, throws light on decedent's intent. Prior thereto, and until the year of decedent's death when this Court decided the *Hallock* case, it was believed (and held, in 1935, in *Helvering* v. *St. Louis Trust Company*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Company*, 296 U. S. 48) that even the retention of an *express* possibility of reverter did not render a transfer one which took effect in possession or enjoyment at or after death within the meaning of Section 811(c) and similar earlier statutes. Twenty years after the Spiegel trust was created, this Court (by its *Hallock* decision in 1940) overruled the *St. Louis Trust Company* decisions and held, for the first time, that the retention of an express possibility of reverter did render a transfer one which took effect at or after death. Against that background, it seems impossible (even after giving effect to all presumptions and assumptions which can be made against decedent) that decedent, by unwittingly (R. 33-5) retaining a remote possibility of reverter by operation of law, *intended* to make a transfer to take effect, not immediately, but only at his death. Under the then state of the law, he must have believed, and was justified in believing, that the transfer, made by the trust, took effect at once.

Hallock ad absurdum.

If the instant decision of the Court of Appeals is correct, there will (as a matter of law) be a transfer intended to take effect at or after death upon the creation of every

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to third parties. The author concludes that possibilities of reverter by operation of law do not render transfers taxable if both income and corpus are transferred.

See also, Spencer, The Federal Estate Tax on *Inter Vivos* Trusts: A Common Sense Rule for Hallock Cases, 59 Harv. L. Rev. 43, 67, *f.n.* 59.

inter vivos trust under which a remainder goes to an individual, or to one of a number of successive individuals, who survives the settlor. This result could, perhaps, be avoided by naming a government or charity as ultimate remainderman. If, upon the death of a settlor, corpus goes to a named person if he survives the settlor, or to a second named person if the first person does not, and the second does, survive the settlor, and so on, naming 100, 1,000 or 100,000 persons successively, nevertheless the settlor, under the Court of Appeals' decision here, would retain a possibility of reverter by operation of law if he survived all of such 100, 1,000 or 100,000 persons. Even though it could possibly be seriously argued that such a trust takes effect in possession or enjoyment only at the settlor's death, it will hardly be suggested that it was *intended* so to take effect.

Even the Second Circuit (which refused in the *Bayne* case to consider intent of the settlor and held that existence of a possibility of reverter by operation of law was sufficient, alone, to bring a transfer within Section 811(c)) has, nevertheless, stated that there must be some limit beyond which the so-called *Hallock* principle cannot be carried. See *Commissioner* v. *Estate of Singer*, 161 F. 2d 15, 18 (CCA 2d, 1947).

The Tax Court, too (recognizing that this Court's *Hallock*, *Fidelity-Philadelphia* and *Field* decisions involved *express* retentions of strings or ties and, further, that the latter two were limited to a consideration of the proper amount of tax), holds that retention of an extremely remote reverter by operation of law is not sufficient to make a "survivorship case." Its position still is, as stated in *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885 (1943):

> (p. 891) "* * * If taxation is a practical matter, we cannot shut our eyes to the practical certainty that

decedent would not survive the others. It was certain enough, we think, to be given effect in the ordinary affairs of life, and if so it should be enough for tax purposes. And surely we cannot say that decedent *intended* to make the gift incomplete until her death by studiously reserving through silent implication of law a minute chance of recapture."

See also, *Estate of Edward P. Hughes*, 7 T. C. 1348 (1946).

Respondent, however, has taken the "reverter by operation of law" bit in his teeth and is speeding toward that *ultima Thule* where tax liability is limited only by the revenue collector's imagination.[21] He has attempted to hold an estate liable where the settlor of a trust could take solely as a distributee of a deceased remainderman. *Commissioner v. Hall's Estate*, 153 F. 2d 172 (CCA 2d, 1946); *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885, 891-2 (1943). He has claimed tax on over $335,000 of property where the actuarial value of decedent's possibility of reverter by operation of law was $0.0000000000876 (eight hundred seventy-six—ten trillionths of one dollar). *Estate of Ellen Portia Conger Goodyear, supra*, 2 T. C. at p. 887. He has even contended that an ultimate remainder to charity is not sufficient to exclude a taxable possibility of reverter by operation of law. *Estate of Bertha Low*, 2 T. C. 1114, 1124 (1943).

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[21] See, Paul, Federal Estate and Gift Taxation—1946 Supplement—page 194:

"* * * Every trust is carefully and thoroughly combed for some possibility that the property could find its way back to the decedent or his estate. Reverters, like the proverbial ghost under the bed, seem to be concealed beneath practically every trust. The net result is that almost every trust would be subjected to estate tax, although a logic which is in hot pursuit of well-nigh every indenture seems a bit too remorseless in terms of legislative intent."

See also, Eisenstein, The Hallock Problem: A Case Study in Administration, 58 Harv. L. Rev. 1141, 1179:

"For no respectable system of death taxation could long tolerate the remarkably strange results upon which the Bureau sternly insists under cover of the *Hallock* decision."

Respondent, in administering Section 811(c), has, when necessary to impose tax liability, converted the rule (laid down by the four dissenting members of this Court in *Helvering* v. *St. Louis Trust Co.*, *supra*, 296 U. S. at p. 47, and adopted by the Court in the *Hallock* case, *supra*, 309 U. S. at p. 114) that:

> "In determining whether a taxable transfer becomes complete only at death we look to substance, not to form"

into:

> "In determining whether a taxable transfer becomes complete only at death we look to *form*, not to substance."

The question of intent is properly one of fact for the Tax Court.

As a practical matter, each case of reverter by operation of law must be determined on the basis of its own facts. No hard and fast line can be drawn, which will define, in advance, the conditions under which a transfer, involving a possibility of reverter by operation of law, may be held to have been intended to take effect at or after death. However, that is not a novel situation. As Mr. Justice Holmes said in *Irwin* v. *Gavit*, 268 U. S. 161 (1925):

> (p. 168) "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law * * *. Day and night, youth and age are only types. * * *"

See also, *Harrison* v. *Schaffner*, 312 U. S. 579, 583 (1941); *Bazley* v. *Commissioner*, 67 S. Ct. 1489, 1491 (1947).

The Tax Court has in the past made the necessary determinations, case by case. See pp. 39-40, *supra*. In the instant case, the Tax Court held (R. 129) that decedent

"retained no 'string or tie' amounting to a possibility o reversion" and, therefore, could not have intended to mak a transfer to take effect at or after his death.

Intent is a question of fact and the Tax Court is th tribunal, set up by Congress, to determine facts in ta litigation. *Choate* v. *Commissioner*, 324 U. S. 1, 3- (1945); *Commissioner* v. *Scottish American Investmen Company, Limited*, 323 U. S. 119, 123-4 (1944). It wil in the course of time, if it has not already, build up body of precedents upon which taxpayers can rely, although from the nature of the questions involved, borderline case will continue to arise.

Therefore, even though this Court should hold that th remainders at bar were contingent (thus leaving decedei with a remote possibility of reverter by operation of law nevertheless, unless it is ready to hold, further, that, solel because a remote possibility of reverter by operation of la exists, the transfer must, *as a matter of law*, have bee "intended" to take effect at or after death, regardless intent in fact, the Court should reverse the Circuit Cou of Appeals and affirm the Tax Court.

IV.

Under Dobson v. Commissioner, the Tax Court's Decisi Is Conclusive.

Although the Circuit Court of Appeals was of opini that (i) Spiegel had retained a remote possibility of verter in the trust corpus, (ii) *Reinecke* v. *Northern Tr Company* did not control the decision in the case at b and (iii) the instant transfer in trust was intended to ta effect in possession or enjoyment only at Spiegel's dea nevertheless, under the principles of this Court's *Dob* decision, the Court of Appeals should have affirmed Tax Court.

The Dobson rule.

Dobson v. *Commissioner*, 320 U. S. 489 (1943), decided (p. 501) that, if the Tax Court's decision has "'warrant in the record' and a reasonable basis in the law" it must be treated as final, since "'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" The Court there held (p. 502) that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."[22]

In subsequent decisions, the Court has made the *Dobson* rule more specific. Thus, it is the Tax Court's (not the Court of Appeals') function to draw inferences from facts and to supplement stipulated facts.[23] In the event the Tax Court's application of law to the situation before it is a reasonable one, it cannot be said that its action was "not in accordance with law," and, therefore, its decision is not reviewable under the Internal Revenue Code.[24]

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[22] See also, *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 526, *et seq.* (1946); *Commissioner* v. *Henry's Estate*, 161 F. 2d 574, 577 (CCA 3d, 1947); *Commissioner* v. *Church's Estate*, 161 F. 2d 11, 12 (CCA 3d, 1947), certiorari granted June 16, 1947 (#96).

[23] *Equitable Life Assurance Society* v. *Commissioner*, 321 U. S. 560, 563 (1944); *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. 119, 123-4 (1944).

[24] *Trust of Bingham* v. *Commissioner*, 325 U. S. 365, 370 (1945). See also, *Brooklyn National Corporation* v. *Commissioner*, 157 F. 2d 450 (CCA 2d, 1946), certiorari denied 329 U. S. 733, where the court stated:

> (p. 452) "As we understand it, before we may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor."

Finally, if the case can be reduced to its own particular circumstances, rather than turn on a generalizing principle, the Tax Court's decision must not be reversed.[25]

The Tax Court's decision here is final although it is held that decedent retained a possibility of reverter by operation of law.

Under the *Dobson* decision, even if it should be held by this Court that Spiegel retained a remote possibility of reverted by operation of law, still, since the Tax Court's decision involved, fundamentally, a determination of fact, it must stand. That decision (holding, as it did, that Spiegel retained *no* "string or tie") necessarily included a determination that he did not *intend* to retain any "string or tie" and, hence, that Section 811(c) was not applicable to the transfer in trust. To reach its conclusion in the case at bar, the Tax Court was required to construe the trust instrument in the light of the additional evidence presented to it and, as was said in *Trust of Bingham* v. *Commissioner, supra,* 325 U. S. at p. 380:

> "The specialized equipment of the Tax Court and the trained instinct that comes from its experience, ought to leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the *Dobson* case as a 'clear-cut mistake of law.'"

The Court of Appeals' holding here is, in substance, that mere retention of a possibility of reverter by operation of law renders a transfer, *as a matter of law,* one intended to take effect in possession or enjoyment at or

[25] *Trust of Bingham* v. *Commissioner, supra,* 325 U. S., at p. 382; *Commissioner* v. *Estate of Edward T. Bedford,* 325 U. S. 283, 292 (1945).

after death, regardless of remoteness or actual intent. Unless, however, this Court is ready to hold (and it has not heretofore held) that the retention of *any* possibility of reverter by operation of law is sufficient, *as a matter of law* and regardless of any other relevant facts, to bring a transfer within the provisions of Section 811(c), we submit it must hold, as does the Tax Court, that taxability depends upon the transferor's intent, and that a finding of existence of the required intent depends, among other things, upon relative remoteness of the retained possibility. See pp. 39-40, *supra*. These questions are questions of fact upon which the Tax Court's decision is final and not subject to review. As this Court said in *Choate* v. *Commissioner*, 324 U. S. 1 (1945):

> (p. 3) "In the second place, the Tax Court found that the parties *intended* a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under *Dobson* v. *Commissioner*, 320 U. S. 489, and *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 167-168." (Italics ours.)

See also, *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. 119, 125 (1944).

The Tax Court's decision laid down no general principles or rules of law.[26] It was restricted to the facts of this case, and, therefore, involved an issue of fact. The answer it gave was fair and had a reasonable basis in fact. Accordingly, the *Dobson* case precludes independent appellate court examination of the Tax Court's disposition.[27]

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[26] In his Memorandum in reply to the Petition for Certiorari here, Respondent stated that:

> (p. 10) "Finally, the local law aspect of this case is plainly of no general importance, each case, turning as it must, on its own facts."

[27] *Trust of Bingham* v. *Commissioner*, *supra*, 325 U. S. at p. 384; *Commissioner* v. *Scottish American Investment Company, Limited*, 323 U. S. *supra*, at p. 124.

Determination of controlling force of Reinecke decision, likewise, involves facts.

In the case at bar, the Tax Court independently exercised its judgment[28] and decided that:

> (R. 129) "The decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion, * * *."

It, therefore, held that the trust corpus was not includible in gross estate on the authority of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, and that the *Hallock* doctrine was not applicable.

Reinecke decided that the trust corpus, there before the Court, was not includible in gross estate, because:

> (278 U. S. at p. 346) "* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

The *Reinecke* case has never been overruled and, therefore, controls all cases presenting substantially the same facts.

There is no dispute concerning the law as laid down in the *Reinecke* case. Obviously, therefore, the Tax Court followed the *Reinecke* decision because it concluded that the facts in the instant case were substantially the same as those before the Court in *Reinecke*. Just as clearly, the Court of Appeals reversed the Tax Court because it was of the opinion that the facts, involved in the Spiegel case, were substantially different from those in the *Reinecke*

[28] Cf. *Commissioner* v. *Heininger*, 320 U. S. 467, 475 (1943), which affirmed the judgment of the Circuit Court of Appeals reversing and remanding to the Tax Court, where the Tax Court did not exercise independent judgment but determined facts on the mistaken conviction that a particular determination was required as a matter of law.

case. Referring to Petitioner's reliance upon the *Reinecke* case, the Circuit Court of Appeals said in the instant case:

> (R. 157) "We do not think this case [Reinecke] controlling here because as to the five trusts held nontaxable in that case, the Court said at page 346:
>
> '* * * the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.'
>
> "We hold in the instant case that there was a possibility of the corpus of the trust returning to the settlor because of the precedent condition that the beneficiaries or some of them must survive the settlor, and *that the corpus had not completely passed from the settlor.*" (Italics ours.)

The Tax Court heard (i) evidence (R. 33-35) that decedent specifically intended to divest himself of all interest in the trust property, and (ii) actuarial evidence (R. 32, 35-36) that (even assuming decedent could, under any circumstances, get trust corpus back by operation of law if he survived his descendants) his chance of outliving his descendants was negligible. On the basis of that evidence, applied to the trust instrument, it held that, for all practical purposes, he had completely given the corpus away. The Court of Appeals, considering the same evidence (and there was no contrary evidence) and the same trust, held that he had *not* given the property away.

We submit that the decision of the Tax Court was correct. Decedent had, for all practical purposes (for all purposes, we submit), given away the trust property and the *Reinecke* decision controlled. In any event, however, the Tax Court did not make a "clear-cut mistake of law." Even assuming for argument's sake that there still remained in Spiegel a remote possibility of reverter by operation of law, the question, whether that remote possibility prevented the gift in trust from being, for practical pur-

poses, an outright gift, was either a question of fact, or a mixed question of law and fact, to be determined by the Tax Court which has as its function to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences.[29] There was substantial basis in the evidence for the determination of the Tax Court, and, accordingly, the process of judicial review was at an end.[30]

The Tax Court's decision should, accordingly, have been affirmed by the Circuit Court of Appeals.

CONCLUSION.

This Court should reverse the Circuit Court of Appeals and affirm the Tax Court for the following reasons:

1. Decedent did not expressly retain any interest in trust corpus and had no possibility of any interest therein by operation of Illinois law.

2. The decision of this Court in *Reinecke* v. *Northern Trust Company* cannot be distinguished from the case at bar and controls.

3. The mere existance of a possibility of reverter by operation of law does not, *as a matter of law*, make a transfer subject to estate tax under the *Hallock* decision. Even assuming that the decedent had retained a remote possibility of reverter by operation of law, the question whether he *intended* the transfer in trust to take effect in possession or enjoyment immediately, or only at or after his death, was essentially a question of fact for determination by the Tax Court. Upon the record here, the decision of the Tax Court was correct.

4. Under the *Dobson* rule, the Tax Court's decision was

[29] *Wilmington Trust Company* v. *Commissioner*, 316 U. S. 164 (1942).

[30] *Commissioner* v. *Scottish American Investment Company, Limited*, *supra*, 323 U. S. at p. 125.

in any event, conclusive since it involved no clear-cut mistake of law, was fair and reasonable, and passed only upon the specific case before the Tax Court without laying down any general principles.

Respectfully submitted,

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September 27, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 52 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM, and
LOUIS A. KOHN,
Attorneys for Petitioners.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Petitioners believe that a reply is required to certain of Respondent's arguments in order to clarify the issues and aid the Court.[1]

[1] This Reply Brief follows the order of Argument in Petitioners' main Brief.

I.

Under Illinois Law, Decedent Retained No Possibility of Interest in the Trust Property. The Trust Corpus Was, Therefore, Not Includable in His Gross Estate For Tax Purposes.

Respondent argues (Res. Br. p. 9) that, under Illinois law, if Spiegel had outlived all of his children and their descendants "the corpus would be restored to him in such circumstances, just as though he had explicitly provided therefor." If this statement were in accordance with Illinois law, Spiegel would have had a possibility of reverter by operation of that law, which might or might not require the corpus to be included in decedent's gross estate (Pet. Br. pp. 34-46). If, on the other hand, Respondent's statement does not accord with applicable Illinois law, his entire case falls, since his theory of liability rests (as it must under Respondent's Regulations) upon a claim that Spiegel, at his death, retained a possibility of reverter by operation of Illinois law.

There can be no possibility of reverter by operation of Illinois law after a vested remainder in fee.

Respondent's statement is not in accordance with Illinois law. Under that law, the corpus of the trust could not have come back to Spiegel under any circumstances since he completely disposed of all interest in the trust property when he made gifts of vested remainders in fee. There can be no possibility of revertor of property which has been transferred by a vested remainder in fee, whether the transfer is by testamentary disposition, by deed or by *inter vivos* trust.

A vested remainderman must be ready to take possession

of property in remainder, whenever and however the preceding estate ends, for, as stated in *Lachenmyer* v. *Gehlbach*, 266 Ill. 11, 17:

> "A vested remainder is one which throughout its continuance gives to the remainder-man, or his heirs, the right to the immediate possession, whenever and however the preceding estates may determine."

If a vested remainderman is not alive to take possession upon the termination of the next preceding estate, his next-of-kin or legatees will take in his place (Pet. Br. pp. 21-2).

Since possession of a vested remainder must, by definition, pass to the remainderman, his next-of-kin or legatees upon the termination of the preceding estate under any conditions, the creator thereof can never recover back any part of the property, which is the subject of the vested remainder. A vested remainderman may, of course, be divested of his interest by a specific condition subsequent, but, in that event, possession of the property passes, upon the occurrence of the condition, to those persons (and those persons only) who are named in the condition. If those named in the condition are not available to take, there will be no reverter and no failure of the trust; there will simply be no divestment and the remainder interests will remain where they are—in the remainderman, his next-of-kin or legatees (Pet. Br. pp. 22-5).

There can be no failure of a trust which provides for a vested remainder in fee.

All this is horn-book law. However, Respondent, apparently, overlooks these elementary principles of property law and advances the novel theory (Res. Br. p. 11) that a trust will fail at any time at which there is no living designated beneficiary who may take possession of the trust property upon the trust's termination.

We have no quarrel with Respondent's arguments that, *if* a trust fails (as may happen when contingent remainders are created), there will be a reverter or resulting trust to the settlor. We do however, most emphatically challenge his contention that there *can* ever be a failure of a trust which provides for a vested remainder in fee, as, by definition, there must always be a beneficiary (whether the named remainderman, his next-of-kin or legatees) ready to take possession of a vested remainder upon any termination of the trust. See, Restatement of the Law of Trusts, § 411 (*l*).

A resulting trust or reverter is nothing more than the right of a settlor, who has conveyed complete *legal* title to a trustee, to receive back from the trustee title to any portion of the trust property, the full *equitable* title to which has not been transferred by reason of failure to designate a person to take under the circumstances which occur.[2] There can, therefore, be no reverter or resulting trust with respect to, and no failure of, a trust which completely disposes of the entire legal and equitable interest in property by vested remainders in fee.

We submit that the Spiegel remainders were vested and that, therefore, the trust could not fail (Pet. Br., pp. 17-20,

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[2] See, 3 Scott, Trusts, Sec. 411.5, p. 2182:

"Where property is given in trust for one beneficiary for life and to another beneficiary in remainder, and before the termination of the trust the latter beneficiary dies intestate and without heirs or next of kin, it would seem that his interest passes to the state, and that a resulting trust will not arise in favor of the settlor or his estate. In such a case, since the entire beneficial interest, subject to the preceding life estate in the other beneficiary, vested in the beneficiary entitled in remainder absolutely at the time of the creation of the trust, it would seem that the trust does not fail on his death, so as to give rise to a resulting trust, but his interest passes to the state as *ultimus haeres*. On the other hand, if the beneficial gift over is contingent, and the contingency does not occur, a resulting trust will arise in favor of the settlor or his estate."

21-25). Spiegel could, accordingly, take no interest therein by reverter, resulting trust or otherwise.

Respondent's inconsistent positions with respect to the vested character of the instant remainders.

1. At the oral argument before the Circuit Court of Appeals, Respondent conceded that the instant remainders were vested but contended, there, that, under the *Hallock* decision, the character of the remainders was of no tax consequence. He overlooked, at that time, the fact that there can be no possibility of reverter by operation of law after a vested remainder in fee.

2. Subsequently, in his Memorandum in reply to the Petition for Certiorari, Respondent again conceded (Memorandum, p. 8) that the Spiegel remainders were vested but argued there is no substantial difference between a vested remainder, subject to divestment, and a contingent remainder. Respondent, there, overlooked the fact that the Illinois decisions, upon which he relied to support his position, had been squarely overruled by the Illinois Supreme Court (Pet. Br. p. 20).

3. Now, in his Brief, Respondent takes a third—equally unsound—position. He argues (Res. Br. pp. 11-12) that *Lachenmyer* v. *Gehlbach*, *supra*, and similar decisions involving wills (which hold that remainders, such as those of the instant trust, are vested remainders), "are of little aid in construing an *inter vivos* trust."

Illinois courts apply the same rules to vesting of remainders whether created by will, deed or trust.

Respondent's novel theory finds no support in the Illinois decisions. Certainly, the rule laid down in Gray, The

Rule Against Perpetuities (relied upon in *Lachenmyer* v. *Gehlbach, supra,* at p. 19, as authority for the decision that the remainders, there before the court, were vested remainders) is not applicable solely to testamentary dispositions; Gray's work covers future interests generally. Further, Williams on Real Property, Blackstone's Commentaries, Kent's Commentaries and Fearne on Contingent Remainders (also relied upon in *Lachenmyer* v. *Gehlbach, supra,* at pp. 17-18) are texts which deal with transfers in general. In the light of the authorities upon which the court relied, it is, therefore, impossible to follow Respondent's argument that *Lachenmyer* v. *Gehlbach* laid down a rule of vesting which cannot be applied to *inter vivos* transfers in trust.

Harder v. *Matthews,* 309 Ill. 548, and *Smith* v. *Dugger,* 310 Ill. 624, were both decisions dealing with *inter vivos* deeds and each relied upon, and Respondent concedes (Res. Br. p. 15) that they relied upon, *Lachenmyer* v. *Gehlbach,* which dealt with a will.

Temple v. *Scott,* 143 Ill. 290 (1892), involved the question whether remainders under an *inter vivos* trust were contingent or vested. The court determined that the remainders were contingent and (pp. 296-8) reviewed the applicable law. The authorities, relied upon by the court, were Blackstone's Commentaries, Kent's Commentaries, Washburn on Real Property, Preston on Estates, three Illinois decisions dealing with testamentary transfers, a New York decision involving a will and a Massachusetts decision dealing with an *inter vivos* trust. It is accordingly clear that the court did not believe that a different rule should be applied to determine the character of a remainder, created by a will or deed, than that applied to determine the character of a remainder created by *inter vivos* trust.

Again, in *Strode* v. *McCormick,* 158 Ill. 142 (1895), the court was required to determine whether interests under

an *inter vivos* trust were vested or contingent. In its decision, the court relied (p. 148) upon rules with respect to vesting of remainders, laid down in five Illinois decisions involving transfers by will, and two English decisions likewise dealing with testamentary dispositions.

This Court, in *Klein v. United States*, 283 U. S. 231 (1931), had to determine whether an Illinois deed created a vested or contingent remainder. It decided that the remainder, there before the Court, was contingent upon the authority of two Illinois decisions, each of which dealt with transfers by will (Pet. Br. pp. 28-9).

In *Coolidge* v. *Long*, 282 U. S. 582 (1931), the Court considered an *inter vivos* trust, which cannot be distinguished from the Spiegel trust and held (p. 597):

> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons, subject to be divested only by his death before the death of the survivor of the settlors. It was a grant *in praesenti* to be possessed and enjoyed by the sons upon the death of such survivor. * * *"

The dissenting opinion in *Coolidge* v. *Long*, likewise, held (p. 609) that the remainders were vested. Thus, this Court applied to an *inter vivos* trust the same rule with respect to vesting of remainders as did the Illinois court in *Lachenmyer* v. *Gehlbach*, *supra*.

See also, to the same effect, *Cole* v. *Sewell*, 2 H. L. C. 185, 236 (1848), and *In Re Friend's Settlement*, 1 Ch. 47 (1905), which considered *inter vivos* trusts.

Accordingly, it is abundantly clear that courts hold that, if a remainder created by will is vested, the same remainder would be vested if created by deed or *inter vivos* trust instrument.

It is proper that the same rules should apply to vesting of remainders regardless of the instrument by which they are created.

There is good reason why the same language in a will, deed or living trust should create the same character of remainder.

Illinois courts strongly favor the vesting of estates whether created by *inter vivos* trust, by will or by deed. *Wyeth* v. *Crane*, 342 Ill. 545, 550 (1931) and *Poehlman* v. *Leinweber*, 288 Ill. 58, 63 (1919).

In Illinois, as stated in *Merchants Loan and Trust Co.* v. *Patterson*, 308 Ill. 519, 530-31 (1923):

> "It is a fundamental proposition that equitable estates are governed by the same rule as legal estates, otherwise inextricable confusion would ensue."

See also, *Nave* v. *Bailey*, 329 Ill. 235, 244 (1928), and cases there cited. The interests and titles of *cestuis que trust* are "subject to the same incidents and are governed by the same rules of construction as legal estates." See 5 Thompson on Real Property (Perm. Ed.) 16.

Respondent, however, contends that the rule of vesting, adopted in *Lachenmyer* v. *Gehlbach*, *supra*, was established to avoid intestacy (Res. Br. pp. 11-12). He argues that a testator must be dead and therefore cannot deal with his undisposed of property, whereas the settlor of an *inter vivos* trust may be alive and able to dispose of any property which may revert to him. Respondent's argument, however, must be considered in the light of his agreement that rules with respect to vesting of remainders created by wills apply with equal force to deeds (Res. Br. p. 15). Certainly, the grantor of a deed is as likely to be alive and able to dispose of any property which may revert to him

as the settlor of a trust. As to Respondent's argument (Res. Br. p. 13), based upon an alleged analogy between a possibility of reverter and a lapsed legacy, it need only be noted that there can be no reverter (no lapse) of property transferred *inter vivos* by vested remainder, the transfer of which is effective immediately.

Spiegel intended to make an absolute transfer of the trust property without retention of any interest therein.

Respondent devotes a portion of his Brief to argument that Spiegel intended the trust property to revert to him if all his children and their descendants predeceased him (Res. Br. pp. 13-15). The argument is not persuasive. It is difficult to imagine that Spiegel would have objected to a child's *interest* in corpus passing to the child's next-of-kin or legatees during Spiegel's lifetime, since, by the terms of the trust, *possession* of the property (and whatever control the Trustee had over it) could not pass until Spiegel's death in any event. Further, immediately upon the decedent's death, possession of corpus would pass to the named children, if they were living, to do with as they pleased. There, accordingly, seems to be no logical reason why Spiegel would have objected to possession of the property passing *upon his death* (and that is the only time at which possession could pass) to a child's next-of-kin or legatee if the named child died before Spiegel, since, if the child had died the day *after* Spiegel's death, he could pass the property to his next-of-kin, legatees or anyone whomsoever.

Respondent refers (Res. Br. p. 14) to the spendthrift clause as evidence of the decedent's intent that the corpus should revert. That clause, by its terms, refers only to "payments" of income and not to the division of corpus. It was less restrictive than the spendthrift provisions of the trusts in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339

(1929). (*Reinecke* R. 21, 29, 36, 44). Further, in Illinois, the existence of a spendthrift clause is not considered in the determination of the character of a remainder as vested or contingent, *O'Hare* v. *Johnston*, 273 Ill. 458, 469 (1916) and *Von Kesler* v. *Scully*, 267 Ill. App. 495, certiorari denied by Illinois Supreme Court; and it has been held that a spendthrift provision is an affirmative indication of intent to create a vested remainder. *McArthur* v. *Scott*, 113 U. S. 340, 381 (1885), cited with approval in *Thomas* v. *Stoakes*, 328 Ill. 115, 121, and *Pingrey* v. *Rulon*, 246 Ill. 109, 119-120.

Respondent's Brief (pp. 13-14) also refers to *Geiger* v. *Geer*, 395 Ill. 367, *Meldahl* v. *Wallace*, 270 Ill. 220, and *Routt* v. *Newman*, 253 Ill. 185, for the proposition that rules as to early vesting give away before circumstances pointing the other way. The authorities cited, while they may sustain that proposition, have no bearing on the instant case.

Geiger v. *Geer* involved a claim that, upon a testator's death, his heirs took vested interests under a testamentary trust, which provided that remainders in fee should, upon the death of respective life tenants, descend "in accordance with the laws of descent then in force in this State." The court determined that, under a proper construction of the will, each remainder would, upon the death of a life tenant, go to the life tenant's heirs and not, as contended, to the testator's heirs and that the latter took no interest upon the testator's death.

Meldahl v. *Wallace* involved an *inter vivos* trust under which the settlor retained a life estate. The remaindermen were children of the settlor "and the survivor or survivors of them." Each remainderman was granted a general testamentary power to appoint a portion of the trust property if she predeceased the life tenant. If a remainderman died intestate during the settlor's life, the remainderman's husband was given the same right to property in remainder as he would have under the statute of descent with respect to

his wife's property, and the balance of the property in remainder went to the children of the deceased remainderman. The court held that the remainders were contingent, reasoning that, if there had been an intention to grant vested remainders, there would have been no occasion for the foregoing provisions, since, without any such provisions, a vested remainderman would have had the right to dispose of the remainder by will, and a vested remainder would have passed by descent to the remainderman's husband and children. The Spiegel trust contained none of the provisions which the court, in the *Meldahl* case, found to indicate an intent not to give a vested remainder and the *Meldahl* decision, is, in reality, an authority for construing the Spiegel remainders to be vested.

We have already commented on the *Routt* case. See Petitioners' Brief p. 27.

The record does not support respondent's argument as to Spiegel's intent.

There is, however, a complete answer to Respondent's psychological researches into Spiegel's intent. The Record discloses only two pieces of evidence of intent, other than that which is to be found in the trust instrument itself. Spiegel stated to the attorney, who drew the trust, on several occasions prior to its drafting, that he desired and intended the trust property to be transferred for the benefit of his children, and wanted, at no time, to have any interest or title therein (R. 34-35). Actuarial evidence showed that Spiegel's chances of outliving his three children, who were beneficiaries under the trust and living at the date of its execution, were less than 17 out of 1,000 (R. 35-36, 129).[3]

[3] These figures do not take into account chances of surviving the three children and their unborn descendants. There could be no actuarial computation of chances of surviving three children and their unborn descendants. See *Robinette* v. *Helvering*, 318 U. S. 184, 188-189 (1943).

Respondent states (Res. Br. p. 15) that "the language of the Court [in *Smith* v. *Dugger*, *supra*, 310 Ill. at 626,] strongly indicates" that, if one of the grantees, there involved, had died during the lifetime of the grantor and all of his co-grantees had predeceased him, such grantee's share would have reverted to the grantor. We are certain that Respondent made that statement inadvertently. In *Smith* v. *Dugger*, the court did not indicate, strongly or weakly, that, if the last surviving grantee predeceased the grantor, there would be a reverter. The court did say that such was the *"contention"* of the appellee and then proceeded to decide the case in favor of the appellant.

We submit that Spiegel, at the date of his death, had no interest in corpus and no possibility of ever acquiring such interest, whether by reverter, resulting trust, or otherwise.

II.

Reinecke v. Northern Trust Company, 278 U. S. 339, Controls the Case at Bar.

Petitioners contend that the decision of this Court in *Reinecke* v. *Northern Trust Company*, *supra*, controls the instant case (Pet. Br. pp. 30-34). The *Reinecke* trusts were governed by Illinois law, and the provisions thereof cannot be distinguished from those of the instant trust. If the settlor in *Reinecke* had no interest in trust corpus at the time of his death, Spiegel had no interest in trust corpus.

Respondent, however, brushes off (Res. Br. pp. 24-25) the *Reinecke* decision with the statement that it:

> "was decided in 1929, prior to the decision in the *Hallock* case where the importance of a reversionary

interest in a trust was finally established. It does not appear from the Court's opinion in the *Northern Trust Co.* case that there was a possibility of reversion to the settlor, but even assuming that there was, nevertheless the point as to its effect was not raised or considered and the decision there is thought to stand merely for the proposition that *where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion*, the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death." (Italics ours.)

Respondent advances no facts to show that the instant case is distinguishable from *Reinecke*, yet he argues, by indirection and implication, that Spiegel retained a possibility of reverter by operation of law. The Court found no such possibility in the *Reinecke* case and there is no basis for Respondent's contention in the case at bar.

Respondent's statement (Res. Br. p. 25) that no point was raised or considered in *Reinecke* as to the effect of a possibility of reversion is not correct. In the taxpayer's brief, filed in the *Reinecke* case in this Court, it is stated (p. 11):

> "Under the trusts in the instant case at the time of death there were no interests in the decedent in the properties in question upon the transfer of which the tax might be imposed."

A reversion is (and was in 1929) an interest upon which the tax could be imposed, and the Court in *Reinecke* had to (and did) find that there was no possibility of reversion before it could decide that the settlor had, as Respondent puts it (Res. Br. p. 25):

> "parted with * * * the entire beneficial interest in the property, retaining no possibility of reversion."

In *Reinecke*, the Court held that estate taxes were imposed, under the second clause of the earlier counterpart of Section 811(c), only on property interests which passed *from* a decedent upon his death. The decision required determination whether the decedent, during his lifetime, had completely transferred possession and enjoyment. The fact that the beneficiaries received possession of corpus at or after the settlor's death was deemed of no consequence in determining taxability. Likewise, the question now before the Court is whether Spiegel had *given away* all interest in the trust property prior to his death. The Federal estate tax is imposed upon the transmission of property *from* a decedent at the date of death, and is unlike a succession tax which taxes the right to *receive* a decedent's property upon death. As this Court said in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50 (1924):

> "What this law taxes is not the interest to which the legatees and devisees succeed to on death, but the interest which ceased by reason of the death."[4]

If all interest in property has been disposed of by a decedent prior to his death, as in both *Reinecke* and the case at bar, no interest therein can cease by reason of his death and the fact that beneficiaries take possession at the settlor's death is of no estate tax consequence.

We submit that *Reinecke* is on all fours with the instant case, and that the decision here must be the same as it was in *Reinecke*, namely, that the decedent gave away all interest in trust corpus during his lifetime, and, accordingly, that no part of the corpus was includable in gross estate.

---

[4] See also, *Chase National Bank* v. *U. S.*, 278 U. S. 327, 336 (1929); *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151, 155 (1929); *Edwards* v. *Slocum*, 264 U. S. 61, 62-63 (1924); and *Nichols* v. *Coolidge*, 274 U. S. 531, 541 (1927).

III.

Even Though Decedent Had Retained a Remote Possibility of Reverter by Operation of Law, the Trust Corpus Would Not Be Taxable Under Section 811(c).

Respondent, on the erroneous assumption that Spiegel retained a possibility of reverter by operation of Illinois law, argues (Res. Br. pp. 16-26) that the trust corpus was includable in gross estate under Section 811(c), *as a matter of law*. He does not answer, or purport to answer, Petitioners' contention, that, even though Spiegel had, as a matter of law, retained a remote possibility of reverter by operation of law, the trust corpus, nevertheless, would not be includable in gross estate unless, in fact, he intended to retain the possibility.

In connection with Respondent's argument on this branch of the case, it should be noted that, in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108 and *Commissioner* v. *Field*, 324 U. S. 113 (cited in Respondent's Brief, pp. 16-19), there were express rights or interests retained by the settlors of the trusts there before the Court, and both cases, accordingly, fall squarely within the decision of this Court in *Helvering* v. *Hallock*, 309 U. S. 106 (1940), which did not consider the tax effect of possibilities of reverter by operation of law. In addition, the Court did not, in either the *Fidelity-Philadelphia* or the *Field* case, consider whether the interests, there retained, rendered trust corpus subject to tax under Section 811(c), but, in each case, limited its consideration solely to the question of the *amount* and *value* of corpus to be taxed. See *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. *supra*, at p. 109, and *Commissioner* v. *Field*, 324 U. S., *supra* at p. 114.

As to Respondent's reference to the Regulations (Res. Br. pp. 20-22), to the extent that the Regulations purport

to impose a tax on property subject to a remote reverter by operation of law, regardless of whether or not the decedent, in fact, intended to retain such a possibility, we submit that the Regulations go beyond the provisions of Section 811(c) and are invalid.

Respondent argues (Res. Br. p. 23) that the decision of the Court of Claims in *Pennsylvania Co.* v. *United States*, 62 F. Supp. 697, is inconsistent with the decision of the same court in *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565, one of the authorities relied upon by Petitioners for their contention that intent to transfer property by a conveyance, effective at or after death, must be found as a fact in order to render the transfer taxable under Section 811(c) (Pet. Br. p. 40). The *Pennsylvania Co.* decision is not inconsistent with the *Central Hanover* decision. The *Pennsylvania Co.* case dealt with a trust involving both an express retention of a reversion by the settlor (p. 700) and also of a testamentary power of appointment (p. 700); the case, thus, falls squarely within the *Hallock* doctrine. In the *Central Hanover* case, the Court dealt solely with a possibility of reverter by operation of law.

Respondent cites *Estate of Leaman*, 5 T.C. 699, as a Tax Court holding "in circumstances quite similar to those in the instant case" that there was a taxable transfer. (Res. Br. p. 23.) However, the facts involved in the *Leaman* case are not comparable to those in the instant case. In the *Leaman* case, the Tax Court said (pp. 701-2):

> "We turn now to the case at bar. The immediate family of the grantor prior to his death consisted of a son, the infant daughter of that son, and a wife. Except for the reserved power to appoint up to one-third of the corpus to her, no disposition of corpus was made in favor of his wife. Obviously the grantor had not done everything he thought he could do to give away

the corpus. Should he have survived his son and granddaughter, there would have remained his wife and/or his next-of-kin to inherit his estate. *It is clear that he intended the transfer to take effect at his death,* even though he did not see fit to insert the surplus provision that the corpus return to him." (Italics ours.)

In the instant case, Spiegel was survived by three children and three grandchildren, and he left no wife. The trust made provision for all of his family. The Tax Court stated (R. 129) that Spiegel "in creating the trust, retained no 'string or tie' amounting to a possibility of reversion" and it is obvious that the Tax Court was of opinion that Leaman did, and that Spiegel did not, intend his transfer to take effect at death. The decision in *Leaman* is an example of application of the Tax Court's view that reverters by operation of law do not render trust property includable in gross estate unless the facts show that the decedent actually intended his transfer to take effect at or after his death.

Respondent also cites (Res. Br. p. 24) *Estate of Bradley* v. *Commissioner,* 9 T.C. No. 20, as showing that the Tax Court has changed its view. The *Bradley* decision is, however, consistent with the Tax Court's decisions in *Leaman,* as well as in *Estate of Edward P. Hughes, Deceased,* 7 T.C. 1348 (cited in Petitioners' Brief at p. 44 and in Respondent's Brief at p. 23) and *Estate of Nettie Friedman, Deceased,* 8 T.C. 68 (cited in Petitioners' Brief at pp. 39-40, and in Respondent's Brief at p. 23). In its *Bradley* opinion, the court, by clear implication, reaffirms its decisions in the *Hughes* and *Friedman* cases. It, however, sustained the tax in *Bradley* as to one trust, not because of the existence of a reverter by operation of law, but because of an express retention of income by the decedent, which did not fall within *May* v. *Heiner,* 281 U. S. 238, since the

right to such income was retained for a period measured by the life of the settlor's *daughter* who might, and actually did, outlive the settlor. In the instant case no interest in income was retained by the decedent. With respect to the other *Bradley* trust, it contained an *express* provision for payment of corpus to the decedent if his daughter predeceased, and the decedent survived, his wife.

IV.

Under Dobson v. Commissioner, the Tax Court's Decision Is Conclusive.

Respondent's argument, with respect to the controlling force of the *Dobson* doctrine (Res. Br. pp. 26-28) is, basically, that this Court and Courts of Appeals have in instances reversed the Tax Court. He does not answer our argument, made in Point IV of Petitioners' Brief (pp. 46-52), that the Circuit Court of Appeals erred *in the instant case* by its reversal of the Tax Court.

We are at a loss to understand Respondent's statement (Res. Br. p. 27) that:

> "Transfers such as these, where the distribution of the corpus must await the grantor's death, are necessarily intended to take effect in possession or enjoyment at or after such death *as a matter of fact*, and indeed this is recognized in *Reinecke* v. *Northern Trust Co.*, *supra*, page 347. The only question at issue is whether they were so intended as a matter of law." (Italics ours.)

The *Reinecke* case decided (278 U. S. *supra*, at pp. 347-8) that the "possession or enjoyment," referred to in Section 811(c) and similar provisions of earlier Revenue Acts, is the possession or enjoyment which is *retained* by a settlor after an *inter vivos* transfer and passes from him to others at his death. The estate tax law does not concern itself

with the possession or enjoyment acquired by beneficiaries from a trustee upon the settlor's death. Thus, the question, whether a transfer in trust was intended to take effect in possession or enjoyment at or after death, must be decided upon a determination whether the settlor, *as a matter of fact*, intended that *his* right to possession or enjoyment of trust property should cease only at or after his death or immediately upon creation of the trust. See Petitioners' Brief, pp. 37-38.

It is of course true, as the Court recognized in *Reinecke* (p. 347), that, in every instance where a trust instrument sets up a future interest and provides for distribution at or after the settlor's death, possession or enjoyment by *beneficiaries* must be (and, by hypotheses, must always be intended to be) at or after the settlor's death. Nevertheless, the Court in *Reinecke* held that the transfer, there, was not taxable since the *settlor's* possession and enjoyment had been completely transferred from him to the trustee during the settlor's lifetime. By reason of the complete transfer actually effected by the settlor during his life, the Court had no occasion to, and did not, consider whether the settlor *intended* to retain any interest in corpus. He retained no interest and his intent was, accordingly, of no consequence.

Conclusion.

Petitioners submit that this Court should reverse the Circuit Court of Appeals and affirm the Tax Court for the reasons set out in Petitioners' Brief and herein.

Respectfully submitted,

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October 21, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' SUPPLEMENTAL BRIEF ON REARGUMENT.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 3.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' SUPPLEMENTAL BRIEF ON REARGUMENT.

This case was originally docketed as Number 52, October Term, 1947, and argued orally on October 24, 1947.

On June 21, 1948, the Court ordered the case restored to the docket for reargument, and requested counsel, in briefs and on oral argument, to discuss specified questions in so far as they are relevant to the case. Supreme Court Journal, June 21, 1948, pp. 296-8.

Pursuant to such order, this Supplemental Brief discusses the specified questions, repeating only such part of the argument, made in Petitioners' original Brief and Reply Brief, as is required to present the case coherently. Petitioners, however, pray that, upon reargument, the Court consider their original Brief and Reply Brief (herein referred to as the "Brief" and "Reply Brief") in conjunction with this Supplemental Brief.

The *opinion of the Tax Court* (R. 126) is not officially reported. The *opinion of the Court of Appeals* (R. 151) is reported in 159 F. 2d 257.

The *jurisdiction* of the Court is under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

1. See also section 1254(1), Title 28, United States Code, as amended by section 1 of Public Law 773, 80th Congress, 2d Session, effective September 1, 1948.

STATEMENT.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). In 1920, decedent, who was a resident of Illinois (R. 25), transferred certain securities by a written instrument to himself and another Illinois resident as trustees (R. 25).

The trust (R. 86-7) provided for payment of income, during decedent's lifetime, equally to or for the benefit of decedent's three children, named in the trust. Upon his death, corpus was to be divided equally among the same three children. If, however, any of Spiegel's children died leaving children surviving, the children of the deceased child would receive the share to which their parent would have been entitled; or, if any of Spiegel's children died leaving no child surviving, the deceased child's share would go to Spiegel's other children and the descendants of his other deceased children.

No provision was made for reversion of the trust property to decedent or his estate under any circumstances. Decedent retained no power to alter, amend or modify the trust and no power of appointment. It is stipulated that the gift in trust was not in contemplation of death (R. 26).

At the creation of the trust, decedent was a widower, 47 years old (R. 25). His three children, named in the trust, were his only children and were then 23, 15 and 13 years, respectively (R. 25). Decedent died, aged 68 years and without remarrying, and was survived by the three children who were then 44, 36 and 34 years, and, in addition, by three grandchildren who were then 10, 4 and 2 years (R. 25).

From and after execution of the trust, all income was distributed to or for the benefit of decedent's three children

(R. 25). Upon decedent's death, the three children received corpus of the trust in equal shares (R. 26).

The attorney, who drew the trust, testified (R. 34-5) that Spiegel had, on several occasions prior to drafting the instrument, stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children and wanted, at no time, to have any interest or title therein.

Petitioners did not include any part of the value of the trust estate in gross estate returned for estate taxes (R. 26). Respondent, however, claimed that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of section 811(c) of the Internal Revenue Code (R. 21, 29). He, therefore, increased the value of the gross estate, as returned, by $1,151,189.21 (of which amount substantially all —$1,140,606.30—represented the value of trust corpus; R. 9, 26) and asserted an estate tax deficiency of $454,788.58 (R. 8).

The Tax Court, on petition for redetermination, held that the trust was not properly included in gross estate since decedent had retained no interest therein (R. 129), and, further, that Petitioners were entitled to a refund of $2,423.95 on account of an executor's fee which had been paid but not deducted in the return (R. 133).

Respondent petitioned the Court of Appeals to review the decision of the Tax Court (R. 134). The Court of Appeals reversed the Tax Court and held that the value of the corpus of the trust was properly included in gross estate of the decedent, deciding that the children's interests in corpus were contingent remainders (R. 153-4) and that, therefore, there was a possibility of the trust failing and the property reverting to the settlor by operation of governing Illinois law.

Petitioners petitioned this Court for a Writ of Certiorari which was granted (R. 211).

The *assigned errors*, intended to be urged, are stated on page 6 of the Brief.

The *Statute involved* is set out on page 7 of the Brief.

The *questions presented* are listed on page 8 of the Brief.

PROPOSITIONS RELIED UPON.

The corpus of the trust should not be included in gross estate for the following reasons, presented and argued in detail in the Brief and Reply Brief:

1. The trust was a completed gift upon its creation and there is no liability for estate taxes with respect thereto. Since decedent retained no express right of reversion and had no possibility of reverter by operation of governing Illinois law, there was nothing to pass from decedent—no right or interest of decedent to cease—upon his death.

See Brief pp. 14-29 and Reply Brief pp. 2-12.

The trust created vested remainders in each of the three named children, subject to divestment only in favor of other named children and descendants of children, but under no conditions in favor of decedent. See Brief pp. 17-20. Accordingly, no one, other than the children and their descendants, could possibly take. There can be no possibility of reverter by operation of Illinois law after a vested remainder, and a vested remainder can be divested only in favor of the identical persons specified in the instrument and then only upon occurrence of the exact conditions specified for divestment. In the case at bar, therefore, divestment of a child's vested remainder could occur only if a named child died and if, in addition, one or more of his children or one or more of Spiegel's other named children or their descendants survived to take. Otherwise, the deceased child's vested remainder would not be divested and would pass upon his death to his legatees or next of kin. See Brief pp. 21-25 and Reply Brief pp. 2-5.

2. The decision in Reinecke v. Northern Trust Company, 278 U. S. 339 (1929), is on all fours with the instant case, is the authority on which the Tax Court decided this case, and is controlling. Under Reinecke principles, the trust, here, was a completed gift and the corpus may not be included in gross estate.

See Brief pp. 30-34 and Reply Brief pp. 12-14.

3. Even though decedent had retained a remote possibility of reverter by operation of Illinois law, nevertheless the trust corpus would not be taxable under section 811(c) of the Internal Revenue Code.

See Brief pp. 34-46 and Reply Brief pp. 15-18.

No decision of this Court has passed upon whether existence of a possibility of reverter, solely by operation of law, renders a transfer taxable, under section 811(c), as intended to take effect at death. However, the Court has held that transfers in contemplation of death and transfers intended to take effect at or after death (both covered by section 811(c)) are in the same category and that, "as the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive." *United States* v. *Wells*, 283 U. S. 102, 117 (1931). Thus, a transfer cannot be *intended* to take effect at or after a transferor's death if the transferor *intended* to make an immediate, complete gift.

Unless intent to make a transfer effective only at or after death exists, the transfer does not fall within section 811(c), and intent, like any other fact, is a question for the Tax Court. Retention of an express reverter always evidences intent to retain a string or tie. But, where a reverter can arise only by operation of law, intent to retain an interest may or may not exist.

There is no evidence that Spiegel intended to postpone

completion of the transfer in trust. To the contrary, the evidence is uncontradicted, and the "extrinsic circumstances" (relied upon by the Tax Court in this type of case) make it clear, that he intended to retain no interest in the trust property. See Brief pp. 36-42. See also, additional discussion at pp. 18-21, *infra*.

Further, cessation, at death, of a remote possibility of reverter (such as Respondent alleges existed here), arising solely by operation of local law, does not effect a transfer or cessation of anything real at death. To hold otherwise, would be to disregard substance. See Brief pp. 42-45.

4. Under principles laid down by this Court in Dobson v. Commissioner, 320 U. S. 489 (1943), the Court of Appeals had no authority to review the Tax Court's holding that "decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion."

See Brief pp. 46-52.[2]

2. Section 1141(a) of the Internal Revenue Code was amended by section 36 of Public Law 773, 80th Congress, 2d Session, to provide (effective September 1, 1948) that the Courts of Appeals may review decisions of the Tax Court to the same extent as decisions of the District Courts in civil actions tried without a jury This amendment will nullify *Dobson* as applied to cases arising in the future. It is submitted, however, that the amendment is inapplicable to, and has no effect upon, cases pending in this Court prior to September 1, 1948, on writs of certiorari granted prior to that date.

QUESTIONS SPECIFIED FOR DISCUSSION UPON REARGUMENT.

There follows discussion of questions, relevant to the case at bar, specified by the Court in its reargument order:

Question 1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, inter vivos, did section 811(c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate-tax purposes? That is, did section 811(c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created inter vivos, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

This question is answered in the negative by *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929). *Reinecke* decided squarely that, if a decedent transfers his entire beneficial interest in property to trustees during his lifetime (as did Spiegel), the trust property may not be included in the decedent's gross estate merely because the trust terminates upon the settlor's death and corpus is then distributed to designated beneficiaries.[3]

The Decision in Reinecke.

The question, put by the Court here, was required to be decided in *Reinecke*. The Government's *Reinecke* brief had

3. Provisions of the *Reinecke* trusts are set out in the Brief at pp. 30-31.

set out (p. 13), as the first point of the Argument, the following (also found in 278 U. S. at p. 341):

> "A trust, under which the corpus cannot be distributed until after the death of the settlor, is a trust 'intended to take effect in possession or enjoyment at or after' the death of settlor, within the meaning of section 402(c) of the Revenue Act of 1921."

This Court, accordingly, said:

> (p. 347) "But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, *the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions.*" (Italics ours.)

As in the case at bar, the *Reinecke* life tenants and remaindermen were the same persons.

The question having been put, the Court answered it unequivocally, saying:

> (pp. 347-8) "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y.M.C.A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *N.Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349. It is not a gift tax * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but *we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death.* It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (Italics ours.).

Reinecke followed necessarily from prior decisions of the Court, construing the Federal estate tax statutes (in force since 1916) as laws which, different from State inheritance tax statutes, tax

> "not the interest to which some person *succeeds* on a death, but the interest which *ceased* by reason of the death."

See *Edwards* v. *Slocum*, 264 U. S. 61, 62 (1924); *Y.M.C.A.* v. *Davis*, 264 U. S. 47, 50 (1924); *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921); *Nichols* v. *Coolidge*, 274 U. S. 531, 537 (1927).[4] Those decisions, thus, held that, if a decedent's interest in property, transferred *inter vivos*, ceased prior to his death, there could remain no interest therein to cease at or by reason of his death, and, hence, no estate tax on account of the completed transfer. It was inevitable, then, that *Reinecke* should decide that property, in which decedent had no interest at death, could not give rise to an estate tax merely because the property was distributable at death.

Indeed, Respondent, although he seeks unduly to limit *Reinecke*, recognizes that *Reinecke* squarely answers the question, now raised, in the negative. Respondent states, in his brief here (p. 25), that *Reinecke* stands:

> "* * * for the proposition that where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion, *the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death.*" (Italics ours.)

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4. See *Knowlton* v. *Moore*, 178 U. S. 41 (1900), for history of Federal death taxes prior to 1916. See also, Origin of the Phrase, "Intended to Take Effect in Possession or Enjoyment at or After Death" (Section 811(c), Internal Revenue Code), 56 Yale L. J. 176 (1946).

Further, Respondent's Regulations provide that, in order to constitute a transfer one intended to take effect in possession or enjoyment at or after death, decedent or his estate must, at death, possess some right or interest in the property transferred. Regulations 105, section 81.17.

Congress Has Confirmed the Reinecke Construction.

Congress has adopted the *Reinecke* construction. *Reinecke* was decided in January, 1929. Section 302(c) of the Revenue Act of 1926 (applicable to transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death) was then in force. The provisions of section 402(c) of the Revenue Act of 1921, which were actually before the Court in *Reinecke*, were, so far as material here, the same as those of section 302(c) of the 1926 Act.

After *Reinecke*, the Joint Resolution of March 3, 1931, amended section 302(c) of the 1926 Act to make taxable those transfers (in 1930 held to be nontaxable by *May* v. *Heiner*, 281 U. S. 238) in connection with which the transferor retained income or other enjoyment of the property transferred. The statutory language, construed in *Reinecke*, was left unchanged. Thereafter, section 803(a) of the Revenue Act of 1932 further amended the portion of section 302(c) of the 1926 Act, which had been added by the 1931 Joint Resolution, as well as the portion dealing with transfers within two years prior to death. The part of section 302(c), construed in *Reinecke*, was reenacted without change. Section 302(c), as amended by the 1931 Joint Resolution and the Revenue Act of 1932, is in force today as section 811(c) of the Code. Thus, since *Reinecke*, section 302(c) of the 1926 Act has been amended twice, and, as amended, incorporated into the Code. However, no amendment has affected the statutory language construed in *Reinecke*; that language remains today just as it was when *Reinecke* was decided.

Further, since the 1939 codification and prior to Spiegel's death, the estate tax laws were amended by the Revenue Act of 1939 and the First Revenue Act of 1940, and, after his death, by the Revenue Act of 1941, the Revenue Act of 1942, the Current Tax Payment Act of 1943, the Revenue Act of 1943, and the Revenue Act of 1948. None of such amendments, however, has affected section 302(c) of the 1926 Act, as amended and included in the Code. There have also been attempts, both before and since *Reinecke*, to adopt a Federal inheritance tax on successions by beneficiaries, but Congress has rejected them. See 1 Paul, Federal Estate and Gift Taxation (1942), pp. 11-14.

With this legislative background, it is clear that Congress concurred in, and confirmed, the *Reinecke* construction. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487-9 (1940); *Helvering* v. *Wimmill*, 305 U. S. 79, 83 (1938). Cf. *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, 59-61 (1942).

The Court Has Followed the Reinecke Construction.

The dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39 (1935), is based upon the *Reinecke* holding that a completed *inter vivos* gift in trust is not subject to estate tax, and states (p. 46):

> "Although the tax is a death tax, § 302(c) nevertheless applies to any interest in gifts *inter vivos*, which, by their provisions, are 'intended to take effect in possession or enjoyment at or after death', and such gifts are subjected to the tax as a death tax *if they are not complete until the donor's death*. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Klein* v. *United States*, 283 U. S. 231. The decedent's death, operating upon his gift *inter vivos not complete until his death*, is the event which calls the statute into operation. *Klein* v. *United States*, *supra*, 234." (Italics ours.)

Mr. Justice Stone, who wrote this dissenting opinion, also wrote the opinion in *Reinecke*, and Mr. Justice Brandeis, one of the dissenting Justices, had joined in the *Reinecke* opinion.

Helvering v. *Hallock*, 309 U. S. 106 (1940), adopted the construction of the dissenting opinion in *St. Louis Union Trust Co.*, stating (p. 110):

> "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession and enjoyment at or after his death' *by reason of that which he retained*, is the crux of the problem." (Italics ours.)

It must follow that, if a decedent retains no interest in property transferred *inter vivos*, the transfer was not intended to take effect at or after his death. *Hallock*, too, is based on, and entirely consistent with, *Reinecke*.[5]

Reinecke Construction Should Not Be Rejected.

Decision, here, that section 811(c) of the Internal Revenue Code requires the value of corpus to be included in gross estate merely because distribution was at death will require overruling *Reinecke*. However, *Reinecke* cannot be overruled without overruling *Edwards* v. *Slocum* and the other decisions of this Court, which construe the Federal estate tax laws as taxing, not the interest to which a *beneficiary succeeds* on the death of a decedent, but the interest of a *decedent* which *ceases* upon his death. An utterly new concept of estate taxes must be adopted if the Court should overrule *Reinecke* and now hold that, notwithstanding cessation of all decedent's interest in trust property before death, nevertheless, if the property is *distributed* at death,

5. See *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477, 478 (CCA 2d, 1943); *Commissioner* v. *Lasker's Estate*, 141 F. 2d 889, 890 (CCA 7th, 1944); *Wishard* v. *United States*, 143 F. 2d 704, 708 (CCA 7th, 1944); *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946, 948-49 (CCA 2d, 1945).

it is, solely because of the *time* of distribution, required to be included in gross estate.

In *Helvering* v. *Hallock*, *supra*, the Court said (p. 122):

> "• • • we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created. *Our problem then is not that of rejecting a settled statutory construction.* The real problem is whether a principle shall prevail over its later misapplications." (Italics ours.)

For over twenty years, *Reinecke* has not been questioned. To the contrary, its construction of the estate tax laws has been confirmed by the Congress and this Court. Overruling *Reinecke* does not involve reconsideration of distinctions which the Court has created but the rejection of basic differences, created and perpetuated by the Congress (and long recognized by the Court), between Federal estate and State inheritance tax statutes. It involves holding, for the first time, that the Federal estate tax taxes succession to property by a beneficiary (as do State inheritance tax laws) and not the *transfer* of property from the dead. Cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 269-70 (1928). There is no question here "whether a principle shall prevail over its misapplications." Overruling *Reinecke* requires purely and simply "rejecting a settled statutory construction," and this Court said, in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), that:

> (p. 77) "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century."

The *Reinecke* doctrine has been applied since the adoption of the first Federal estate tax in 1916.

It is clear, we submit, that, under Illinois law, Spiegel retained no interest or possibility of interest of any

character in the trust corpus at his death. It is equally clear that, under the decisions of this Court, the mere fact that the trust terminated, and corpus was distributable, upon Spiegel's death does not throw into his gross estate any part of corpus, in which all of his interest ceased when the trust was created many years before his death.

Question 2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did section 811(c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate-tax purposes?

This question is based upon the assumption (which we submit is erroneous) that, if Spiegel's three children and three grandchildren had all predeceased him, the trust corpus would have reverted to Spiegel by operation of Illinois law. However, even on that assumption, corpus was not required to be included in gross estate. The record is clear that decedent did not intend to retain any right or possibility of reverter in corpus, and, therefore, the *inter vivos* transfer in trust was not intended to take effect at his death. Further, any possibility of reverter, which may have existed, was so insubstantial as to be only a formal (not a real) interest in property.

Intent of Decedent Determines Taxability.

Section 811(c) taxes transfers *intended* to take effect at or after death and, like transfers in contemplation of death, also taxed under section 811(c), the motive or intent of the decedent determines taxability. This Court said, in *United States* v. *Wells*, *supra*, 283 U. S. at pp. 116-17 (referring to the counterpart of section 811(c), then in force) that:

"* * * The quality which brings the transfer within the statute is indicated by the context and manifest purpose. *Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor.* The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. * * * As the transfer may otherwise have all the indicia of a valid gift *inter vivos, the differentiating factor must be found in the transferor's motive.*" (Italics ours.)

Motive or intent "is a question of fact in each case." *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636 (1946). It must be found like any other fact. The Tax Court finds intent from the trust instrument so far as practicable and, in addition and to the extent required, from "the framework of the extrinsic circumstances"—that is to say, from the surrounding facts. Its approach is typified in *Estate of Nettie Friedman, Deceased*, 8 T. C. 68 (1947), where it said:

(pp. 71-72) "Under these circumstances, a reasonable view is that the decedent, the grantor, had no thought of making transfers of property *inter vivos* with the intention that the property could revert to herself or to her estate, or could take effect only at or after her death. And the circumstances that the decedent did not make any more explicit provision in the trust instrument to cover the remote contingency that all of the beneficiaries might predecease her should be regarded as having little or no significance in this case because of the extrinsic circumstances, namely her age and the respective ages * * * of her nephews and grandnephews and nieces and grandnieces."

See also, *Estate of Gilliat G. Schroeder*, 6 T. C. M. Dec. No. 15,815(M) (1947); *Estate of Emma L. Keck, Deceased*, 10 T. C.—No. 144 (June 15, 1948); *Central Hanover Bank*

& Trust Company v. *United States*, 58 F. Supp. 565, 566-7 (Ct. of Cls., 1945).

The Trust Instrument Evidences Intent to Retain No Interest.

The trust instrument, here, made no express provision for reverter to the settlor under any conditions. It was drawn by an experienced attorney, who testified (R. 34-5) that, in connection with its preparation, Spiegel stated that he wanted no right or interest in the trust property and that he (the attorney) had tried to draft a trust which would carry out his client's directions. Spiegel's instructions to his attorney at the time the trust was being prepared are competent and relevant evidence of Spiegel's intent. See *Estate of Sallie E. Walton*, 42 B. T. A. 300, 302 (1940); *Estate of Benjamin P. O'Neal*, 6 T. C. M. Dec. No. 15,881 (M), pp. 717-18 (1947). See also, *United States* v. *Wells*, *supra*, 283 U. S. at pp. 112-13; *Williams* v. *Swango*, 365 Ill. 549, 556 (1937). This evidence of Spiegel's instructions is uncontradicted. In view of the fact that the question of retention of rights was considered, the omission of any "string or tie" is, on the record here, evidence that the omission was deliberate,—evidence that it was intended to retain no interest.

Relative Ages and the Numbers of Remaindermen Evidence Intent to Retain No Interest.

The "extrinsic circumstances" clearly evidence that the settlor had no intent to retain any interest. He was 47 years at the time the trust was created (R. 25). His wife had died many years before and he had not remarried. He had three children, each of whom was named a remainderman. At the inception of the trust, one child was nearly 13 years, another just over 15 years, and the third 23 years

(R. 25). On January 2, 1920, the date of execution of the trust, Spiegel, by actuarial computation, had less than 17 chances out of 1000 of outliving his three children (R. 35-6).[6]

He lived almost 21 years after the trust was executed and, when he died at 68 years, he was still a widower, his three children were still living, and, in addition, he then had three living grandchildren. His then chances of surviving his living children and grandchildren were less than 16 in 100,000 (R. 32), and any possibility of recovering by reverter the $1,140,000 of trust corpus, included by Respondent in gross estate, had a value of just under $85 (R. 32).

The record, here, evidences a very different intent than would have been the case if Spiegel, aged 47 years, had created a trust which provided that income, during the life of the settlor, should go to several persons, each of whom was 75 years at the creation of the trust, and that corpus, upon the settlor's death, should go to those same persons if they survived the settlor. In such a case (assuming a reverter by operation of law to exist in the event that the three aged remaindermen predeceased the settlor), the settlor's intent to retain a string or tie on corpus, and thus, under *Hallock*, to make a transfer which took effect only at his death, would be patent. He would, for all practical purposes, have been certain that he would outlive the remaindermen and get the property back.

Here, however, the settlor, aged 47 years, created a trust which (on any theory) could revert to him only in the event that he survived three persons, aged 13, 15 and 23 years, and all descendants of those persons. In the instant case, the settlor was about as certain as one could be that he would not outlive the remaindermen and would never get

6. This computation takes no account of the possibility that the children might marry and have descendants. See *Robinette v. Helvering*, 318 U. S. 184, 188-9 (1943).

the property back. As the Tax Court said, in *Francis Biddle Trust*, 3 T. C. 832 (1944):

> (p. 843) "* * * Thus, the creation of a trust for the benefit of an aged aunt by a comparatively youthful grantor may demonstrate a totally different intent from a gift to minor grandchildren and their issue and appointees, notwithstanding that the instruments of transfer are otherwise identical."

Immediate Payment of Income to Beneficiaries Evidences Intent to Retain No Interest.

Pursuant to the provisions of the trust, the entire income was paid to or for the children from the outset and for almost 21 years—until Spiegel's death (R. 25). It is, therefore, evident that decedent had no intention of retaining any string or tie on income, which he could have used during his lifetime and which, under then law, he might have retained without estate tax consequences. See *May* v. *Heiner*, 281 U. S. 238 (1930). Yet, it is claimed that he intended to retain a hold on corpus,—a hold which was of no practical value, a hold so tenuous as, for practical purposes, to be non-existent.

Value of Property Not Transferred Evidences Intent to Retain No Interest in Transferred Property.

By the trust, Spiegel gave his children approximately one-half of his property and retained the other one-half for himself, free of the trust. While the values of the trust property and of the free, retained property, at the time of the creation of the trust, do not appear, corpus of the trust was valued by Respondent at about $1,140,000 at date of death (R. 9) and Spiegel's own property was valued in the estate tax return, as at date of death, at $1,082,000 (R.

103).[7] Undoubtedly, therefore, one reason he did not wish to retain any string or tie, and directed his attorney to draw a trust under which he would not keep any interest, was that he had no need for the trust property. Be that as it may, it is hardly likely that a reasonable man, of large means, would have had any interest in a possibility as remote as the possibility of reverter by operation of law, claimed to exist here.

Prior to 1940, Any Intention to Retain Interest Would Have Been Expressed.

In any event, if Spiegel had intended to retain a possibility of reverter, there was, in 1920, no reason—tax or otherwise—why he should not have told his attorney that that was his intention and no reason why the attorney should not have included in the trust an express provision for a reverter. For many years prior to *Hallock*, it had been understood by the bar (and, in 1935, confirmed in *Helvering* v. *St. Louis Union Trust Company*, *supra*, and *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48) that, even if an express reverter were retained, the transfer in trust would not, for that reason, take effect at or after death or subject the settlor's estate to an estate tax. Unless, then, *Hallock* was anticipated by 20 years, the only reason for omission of an express reverter was Spiegel's intention *not* to retain any interest in the trust property.

7. Cf. *Estate of Moir*, 49 B.T.A. 765, 771 (1942), holding that retention of $4,000,000 of property is evidence that gifts of $3,000,000 were not intended as a testamentary substitute.

Regulations Recognize Injustice of Taxing Ante 1940 Trusts.

Respondent recognizes that, *after* the *St. Louis Union Trust Company* cases were decided, taxpayers relied upon those decisions until this Court's *Hallock* decision in 1940. Thus, section 81.17 of Regulations 105 provides that:

> "Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* * * * and *Becker* v. *St. Louis Union Trust Co.* * * *) and January 29, 1940 (that being the date upon which such Court rendered its decision in *Helvering* v. *Hallock* and companion cases * * *), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States*, * * * previously decided by such Court, *then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section*, if the following condition is also met: such transfer shall have been finally treated for all gift tax purposes * * * as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the deceased should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death." (Italics ours.)

The instant case is obviously not classifiable as a *Klein* transfer. See Brief, p. 31. The deed in *Klein* v. *United States*, 283 U. S. 231 (1931), gave a life estate to the grantor's wife but expressly provided (pp. 232-33) that, if

she should predecease the grantor, she should take:

> "no greater or other estate in said lands and the *reversion in fee* in and to the same shall in that event *remain vested* in said grantor * * * such reversion being *hereby reserved* to said grantor and excepted from this conveyance." (Italics ours.)

Under the Regulations, therefore, if the trust at bar had been created in 1936, 1937, 1938 or 1939, instead of in 1920, and gift tax paid (there was no gift tax in 1920) and if the trust had *expressly* provided that corpus should revert to decedent if he survived all his children and grandchildren, the trust would not be taxable. *A fortiori,* the Regulations would not tax a reverter arising solely by *operation of law* under a trust created between 1936 and 1940. However, Respondent argues that, since the trust was created in 1920 *before* the *St. Louis Union Trust Company* decisions, it must be taxed even though those cases dealt with a statute which, so far as material and applicable here, had been in force unchanged since the passage of the first estate tax law in 1916. Cf. *In Re Mullins' Estate,* 71 N. Y. S. 2d 763, 764-6 (1947).

Interest, Alleged to Have Been Retained, Would Not Render Transfer Incomplete.

If a gift tax had been in force in 1920, the total value of the trust, now before the Court, would clearly have been taxed as a completed gift. Any possibility of reverter would have been so uncertain as to be disregarded. Thus, in *Robinette* v. *Helvering, supra,* the Court held that a retained remote reversionary interest (dependent upon the grantor's survival of remaindermen) was too unreal to prevent the transfer from being a present, completed and taxable gift, saying (318 U. S. at pp. 188-89):

> "In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daugh-

ter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true, as the petitioners argue, that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously.' *But before one who gives his property away by this method is entitled to deduction from his gift tax on the basis that he had retained some of these complex strands it is necessary that he at least establish the possibility of approximating what value he holds.* Factors to be considered in fixing the value of this contingent reservation as of the date of the gift would have included consideration of whether or not the daughter would marry; whether she would have children; whether they would reach the age of 21; etc. Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question. * * *'' (Italics ours.)

Nevertheless, when estate taxes are the issue, it is urged that a remote right of reverter by operation of law (which, in 1920, could become operative, on any theory, only upon the death before Spiegel's death of three children, aged 13, 15 and 23 years, and of all of the children whom those three children might bear if they married and had children and which, in fact, never became operative) is sufficiently real to establish a transfer as an incomplete gift, intended to take effect only at the settlor's death, and to require inclusion of over $1,140,000 of trust property in decedent's gross estate.[8]

8. Respondent (purporting to follow *Hallock*) has, in other cases, attempted to tax: (*a*) the possibility that a settlor might take corpus as a distributee of a deceased remainderman, *Commissioner v. Hall's Estate*, 153 F. 2d 172 (CCA 2d, 1946); *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885, 891-2 (1943); (*b*) the pos-

This Court has said that taxes are very real and that taxation is eminently practical. See *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 316 U. S. 56, 58 f. n. 1 (1942). Again, the dissenting Justices in *Helvering* v. *St. Louis Trust Company*, *supra*, 296 U. S. at p. 47, said "in determining whether a taxable transfer becomes complete only at death we look to substance, not to form." Yet Respondent contends that a possibility, which at Spiegel's death in 1940, had 16 chances out of 100,000 of ever occurring and was worth $85 actuarially, must, as a matter of law, subject property to an estate tax of more than $450,000 plus interest.[9] If Respondent prevails here, every trust will be taxable if it terminates upon the death of the settlor unless the ultimate remainder goes to the Government or,

sibility that a settlor might take corpus upon failure of a final remainder to charity, *Estate of Bertha Low*, 2 T. C. 1114, 1124 (1943); and (*c*) a possibility of reverter by operation of law, having an actuarial value of $0.0000000000876, in property valued at over $335,000 at death, *Estate of Ellen Portia Conger Goodyear*, *supra*, at p. 887.

9. See Report No. 2087 of House Ways and Means Committee on H. R. 6712, 80th Congress, 2d Session (Revenue Revision Bill of 1948, passed by House of Representatives, June 19, 1948):

(p. 7) "Under the present interpretation of the estate-tax law, the full value of transfers intended to take effect at or after death is included in a decedent's gross estate, even though his only interest in the property at the time of death is the possibility, however remote, that the donees will not survive the decedent, so that the transferred property will revert to the decedent or his estate or become subject to a power of disposition by the decedent. It has been held [*we assume by certain Courts of Appeals—not by the Supreme Court*] that the transferred property is includible in full in the decedent's gross estate even where the possibility of reverter exists only by operation of law. In short, taxability may rest upon a retained power of microscopic proportions which by inadvertence remained in the hands of the decedent.

"Your committee believes that the present law is unduly harsh. Section 202 of the bill provides that the amount includible in the decedent's estate shall not exceed the actuarial value of the decedent's reversionary interest just prior to his death. * * *"

possibly, a charity. It will not suffice to name any number of successive individual remaindermen because it is conceivable (if one jettisons reality and experience) that all of the remaindermen (no matter how numerous) will predecease the grantor.

The Court should adhere to reality and hold that the possibility of reverter (assuming that any possibility existed) was so remote as to make it certain that there was no intention to retain the possibility. As the Tax Court said in *Estate of Ellen Portia Conger Goodyear*, 2 T. C. 885 (1943):

> (p. 891) "* * * If taxation is a practical matter, we cannot shut our eyes to the practical certainty that decedent would not survive the others. It was certain enough, we think, to be given effect in the ordinary affairs of life, and if so it should be enough for tax purposes. And surely we cannot say that decedent *intended* to make the gift incomplete until her death by studiously reserving through silent implication of law a minute chance of recapture."

We have no quarrel with *Hallock*, *Stinson* or *Field*. Each dealt with a "string" or "tie" expressly retained. We submit, however, that, when, as here, a remote reverter by operation of law is involved, *intent* to retain a string or tie must first be found and the Tax Court, which treats intent in this type of case as a fact to be found from the record, is the proper forum to determine the question of intent to make a complete or incomplete transfer *inter vivos*. The record and law, here, are clear that Spiegel did not intend to, and did not, retain any interest in corpus, and the Tax Court correctly held (R. 129) that he "retained no 'string or tie' amounting to a possibility of reversion."

Question 3. Did section 811(c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

Question 4. Were the joint congressional resolution of 1931 (46 Stat. 1516-1517), and subsequent related estate-tax statutes, intended to be a repudiation of this Court's May v. Heiner (281 U. S. 238) interpretation of the estate-tax statutes?

Question 5. Did the May v. Heiner estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in Helvering v. Hallock (309 U. S. 106)?

These three questions are not relevant to the instant case, as Spiegel retained no interest in income of the trust at bar. The questions have reference to *Commissioner of Internal Revenue* v. *Church*, October Term, 1948, No. 5, which involves a trust under which income was reserved to the settlor.

Even though *May* v. *Heiner* and *Hassett* v. *Welch*, 303 U. S. 303, were to be overruled, *Reinecke* would be unaffected. *Reinecke* passed upon trusts in connection with which the settlor retained no income or other interest. Unlike *May* v. *Heiner* which was nullified *in futuro* by congressional action, *Reinecke* has, in effect, been confirmed by the Congress. See pp. 12-13, *supra*.

Question 6. Under section 811(c) is the "possession and enjoyment" of the corpus of an inter vivos trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

Respondent did not claim a deficiency (R. 21), and did not argue the case in either the Tax Court or Court of Appeals (R. 29-30, 135), on the theory that decedent's control, as cotrustee of a trust which terminated at settlor's death, was sufficient to convert an immediate transfer *inter vivos* into one effective only at death. Respondent has made no such argument here.

The transfer, here, took effect immediately notwithstanding the trust terminated at death. See pp. 9-10, *supra*. The circumstance that Spiegel was a cotrustee with the powers granted by the instant trust could not, we submit, convert the trust into a transfer intended to take effect only at death.

Trustees Had Only Powers Required for Normal Administration.

The fact that decedent was one of the trustees is, of itself, of no significance. A trust is equally effective whether the settlor or a third party is trustee. See *Reinecke* v. *Northern Trust Company*, *supra*, 278 U. S. at p. 346; Restatement of Law of Trusts, § 100.

The trustees, under the Spiegel trust, had powers only sufficiently broad to permit reasonably efficient administration. They were the powers generally given to trustees of securities, namely (R. 86) to (a) hold, manage and control the trust estate, (b) sell, exchange, transfer or otherwise

dispose of the trust property, (c) invest and reinvest proceeds of sales, and (d) take action required to be taken by a holder of securities in the trust. All income was required to be paid out to the beneficiaries or used for their benefit (R. 86). The trustees had no power to accumulate or withhold income. They had no discretion to determine which receipts should be credited to, or which expenses charged against, income or corpus. They were given no authority to borrow money or to pledge the trust estate. They had no power to postpone or accelerate payment of corpus. They were not relieved of liability for malfeasance. They had no power to designate successor trustees. In short, the powers granted the trustees were only "broad" enough to permit them to act as trustees—to administer. More restricted powers would have made the trust impractical and unworkable.

Every trustee must have power to hold, manage and control the trust estate; that is the primary (if not the exclusive) function of an active trustee. See Restatement of Law of Trusts, § 186 (*d*). The powers of the trustees, here, are so usual and commonplace that, under Illinois law as now in force, a trustee has, solely by virtue of being trustee, power to sell and otherwise dispose of trust property upon such terms and conditions as he deems for the best interests of the trust and to invest and reinvest the trust estate as a prudent man, even though the trust instrument does not make any express grant of such powers. Ill. Rev. Stat. 1947, Ch. 148, §§ 32, 35. See also Restatement of Law of Trusts, §§ 190, 193, 227. Fiduciaries in Illinois may, without any specific grant, vote, or give proxies to vote, securities belonging to their trusts. Ill. Rev. Stat. 1947, Ch. 148, § 35; Ch. 32, § 157.30.[10]

10. Under the laws of many other states, a trustee has the power to vote, or give proxies to vote, shares of stock. See, for example, Deering's *California* Corporate Code (1947), sec. 2218; 1935 Rev. Code of *Delaware*, Ch. 65, sec. 18; *Massachusetts* Ann. Laws (Michie) Ch. 155, sec. 21; *Michigan* Ann. Stat. (Callaghan)

Reinecke Answered the Same Question in the Negative.

The Court considered, and was required to decide, this same question—whether retained powers of administration operate to make a transfer effective only at death—in *Reinecke* v. *Northern Trust Company, supra.* Although the settlor, there, was not a trustee, he had reserved power to control certain action of the trustee. In reality, the *Reinecke* settlor reserved substantially broader powers than those granted to Spiegel and his cotrustee and Respondent, in his *Reinecke* brief (pp. 30-31), argued that:

> "The settlor by virtue of the five trusts *retained to a large degree the management and control and had a substantial interest in the trust property until his death.* The trustee was to be 'governed by any instructions or directions in writing given to it by [the settlor] in regard to the management, sale, or investment of any part of said trust estate.' * * * The trustee was required to execute proxies as requested by the founder, thus enabling the founder to vote the stock in his discretion. * * * The trustee was required to 'observe and be governed by any instructions or requests in relation thereto (to real estate) made by an instrument in writing, signed by' the founder. * * * In case of the resignation or disability of any trustee the founder retained the power to appoint a successor. * * * He had a restricted power [with the consent of an interested beneficiary] to alter, change, or modify the terms of the trust. * * * *He thus retained, for his lifetime, complete dominion over the property as distinguished from the beneficiaries' interest in the income and corpus of the trust.* This dominion ceased at his death, and it is submitted that this cessation was the cessation of an interest sufficient to support the tax." (Italics ours.)

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sec. 21.33; *New Jersey* Stat. Ann., sec. 14:10; *New York* Stock Corporation Law, sec. 47 (*In re Ebbets' Will*, 248 N.Y.S. 179; *William Randall & Sons* v. *Lucke*, 205 N.Y.S. 121); Page's *Ohio* General Code, sec. 8623-51; Purdon's *Pennsylvania* Ann. Stat. tit. 15, sec. 107.

The Court, however, rejected Respondent's contention and concluded (*Reinecke* v. *Northern Trust Company*, *supra*, at pp. 346-7):

> "Nor did the reserved power of management of the trusts save to decedent any control over the *economic benefits or the enjoyment of the property.* He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. *The shifting of the economic interest in the trust property which was the subject of the tax*, was thus complete as soon as the trust was made. His power to recall the property and of control over it *for his own benefit* then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." (Italics ours.)

A Trustee's Powers May Not Be Exercised for the Benefit of the Trustee.

If there are to continue to be active trusts, there must be trustees, who, by virtue of their office, have power to administer and act. However, a trustee takes no economic interest in trust property by reason of powers granted to or retained by him as trustee. Such powers must be exercised, not for the trustee's own individual benefit, but for the sole benefit of the beneficiaries. See *Michoud* v. *Girod*, 4 How. 503, 555 (1846); *Magruder* v. *Drury*, 235 U. S. 106, 119 (1914); *Kinney* v. *Lindgren*, 373 Ill. 415, 422 (1940). Retained powers of administration and management, therefore, are not the substantial equivalent of a taxable interest in trust property unless the settlor-trustee, by virtue thereof, retains control over the economic benefits of the trust property. Thus, the Supreme Court of Illinois, in *People* v. *Moses*, 363 Ill. 423 (1936), dealing with an inheritance tax on a transfer al-

leged to take effect at or after death, laid down substantially same rule as did this Court in *Reinecke*, saying:

> (p. 427) "A transfer intended to take effect in possession or enjoyment at or after death is a disposition in which *the donor retains the economic interest or enjoyment of property during his life* and is taxable. * * * A gift or transfer *inter vivos*, not made in contemplation of death, which is *bona fide*, completed and immediately effective and *in which no beneficial enjoyment is reserved by the donor*, is not subject to tax under the act. * * * (Italics ours.)

On the same theory, Respondent's *Clifford* Regulations provide that administrative control of a trust will not render *income* taxable to a settlor (as his income) unless the control is "*exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust.*" Regulations 111, sec. 29.22(a)-21(e). Administrative control, exercisable primarily for the benefit of the settlor, is defined by the Regulations as (a) power which enables the grantor to purchase, exchange, otherwise deal with, or dispose of corpus or income for less than an adequate and full consideration in money or money's worth, or (b) power which enables the grantor to borrow corpus or income without adequate interest or without the same security as must be obtained from a third party, or (c) power to withhold, for more than a year, repayment of corpus or income borrowed by the grantor, or (d) any one of certain powers of administration, "*if exercisable in a non-fiduciary capacity*," namely, power to vote stock or other securities, to control investment of trust funds, or to reacquire trust corpus by substituting other property of an equivalent value. The Regulations, however, provide that, if a power is exercisable by a person as a trustee, it is presumed that it is exercisable in a fiduciary capacity and primarily in the interest of the beneficiaries, and such presumption may be rebutted only

by clear and convincing proof that the power is *not* exercisable primarily in the beneficiaries' interests. The mere fact that a power, exercisable by the trustee, is described in broad language does not, under the Regulations, indicate that the trustee is authorized to deal with the trust property in a non-fiduciary capacity.

Spiegel's Powers, as Cotrustee, Gave Him No Control Over Economic Benefits or Enjoyment.

Spiegel had no power under the instant trust except as a cotrustee. He had no control exercisable for his own benefit or in any non-fiduciary capacity. He had no power to (and he did not) borrow from the trust on any terms. He had no power to (and he did not) purchase or otherwise acquire property of, or deal with, the trust estate. It is stipulated (R. 25) that all of the income of the trust was paid to or used for the benefit of the beneficiaries thereof, as provided in the trust. The trust estate, for many years prior to Spiegel's death, consisted of a widely diversified portfolio of general market stocks and bonds. At his death, there were 138 different items of securities held in the trust (R. 10-21). The control (whether by voting or otherwise) of those securities was of no economic advantage to the trustees as individuals.

As Mr. Justice (then Judge) Cardozo put it, in *Carrier* v. *Carrier*, 226 N. Y. 114, 125-26 (1919), where the settlor had retained much broader powers than did Spiegel:

> "It is true that the creator of this trust had reserved to himself the broadest rights of management. His discretion was to be 'absolute and uncontrolled.' That does not mean, however, that it might be recklessly or willfully abused. *He had made himself a trustee: and in so doing he had subjected himself to those obligations of fidelity and diligence that attach to the office of trustee.* He had power to 'invest'

> the moneys committed to his care. He had no power, under cover of an investment, to loan them to himself. *His discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust* * * *." (Italics ours.)

See also, to the same effect, *Stuart* v. *Commissioner*, 124 F. 2d 772, 778 (CCA 7th, 1941), citing Illinois authorities (reversed on other grounds, 317 U. S. 154); *Blunt* v. *Kelly*, 131 F. 2d 632, 634 (CCA 3d, 1942); *Hall* v. *Commissioner*, 150 F. 2d 304, 307-8 (CCA 10th, 1945); Restatement of Law of Trusts, § 170 and Illinois Annotations thereto, § 170.

The trustees, here, had to have sufficient control over the trust assets so that they could keep the property prudently invested, earning income for the beneficiaries and intact upon distribution. The control granted to the trustees by the instant trust, was, however, no greater than necessary for those purposes. The powers were, certainly, not broad enough to render the trustees, in substance, owners of the trust property for their own benefit. They were not broad enough to change an immediate transfer into one which took effect only upon the death of the settlor.

Question 7. In the light of this Court's opinion in Helvering v. Hallock does the Hassett v. Welch (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

This question is applicable only to *Commissioner* v. *Church*, *supra*.

Question 8. Assuming that under the "refined technicalities of the law of property" the "possession and enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See Helvering v. Hallock, p. 112.)

This question presupposes that the instant trust took effect in possession or enjoyment at its inception and that the decedent retained no interest therein. The assumption is, we submit, correct.

The Spiegel Trust Was Not Testamentary.

A testamentary disposition is, strictly, one which takes effect only at death and until then is ambulatory—of no force or effect. Thus, it is said, in *Ireland* v. *Lester*, 298 Mich. 154 (1941), that:

> (p. 158) "An instrument that is testamentary in character operates only upon and by reason of the death of the maker. Till then, it has no effect or force, and it is this ambulatory quality which is a characteristic of wills. * * *"

See also, *Koppelkam* v. *First Wisconsin Trust Co.*, 240 Wis. 254, 256-7 (1942); Restatement of Law of Trusts, § 53(*a*). The trust at bar was not ambulatory and clearly was not a testamentary disposition.

The Trust Was Not Akin to a Testamentary Disposition.

This Court has held that certain transfers, which are *akin* to testamentary dispositions, are taxable under section 811(c) as transfers intended to take effect in possession or enjoyment at or after death. But the trust, here, took effect immediately and was not *akin* to a testamentary

disposition. Under the laws of Illinois, the trust property passed, irrevocably and without any retained string or tie, to trustees for the beneficiaries when the trust was created. Spiegel, in 1920, gave the trust property away, and the gift was in no way contingent upon his death. Regardless of when he died (whether before or after the beneficiaries), his interest in the trust ceased when the trust was set up. See *supra*, p. 6.

Applying the tests for identification of an *inter vivos* transfer which is "resorted to as a substitute for a will", set up in *Goldstone* v. *United States*, 325 U. S. 687, 690-2 (1945), the trust here did not make "dispositions of property operative at death", the "ultimate possession or enjoyment" was not "held in suspense until the moment of the decedent's death", the "ultimate disposition of the proceeds" of the trust was not "suspended until the moment of decedent's death", and decedent did not possess a reversionary interest at the time of his death, "delaying until then the determination of the ultimate possession or enjoyment of the property". Here, there was an immediate disposition of the property in 1920. Income was paid to beneficiaries throughout the life of the trust. Cf. *Vanderlip* v. *Commissioner*, 155 F. 2d 152, 154 (CCA 2d, 1946). The ultimate disposition of the proceeds of the trust was never suspended; the trust corpus was finally disposed of, from the date of the trust, to the beneficiaries, their next of kin or their legatees, regardless of whether the beneficiaries survived Spiegel. See Brief pp. 14-29, and Reply Brief pp. 2-12.

The transfer was not akin to a testamentary disposition under *People* v. *Moses*, *supra*, where the Court said (... Ill. at pp. 428-29):

> "The common reason inducing a man to make a benefaction by will rather than by present outright gift obviously is that he may retain the beneficial enjoyment and control thereof until his death. *If by a particular transfer the donor retains the fruits of the*

property during his life the transfer is in lieu of a testamentary disposition and subject to the tax, but it is otherwise where the donor by the *bona fide* terms of his act is immediately and absolutely divested of all enjoyment of the property. In our opinion that which determines whether the property transferred is subject to the tax is the substance and contemplated effect and purpose of the transaction and not its technical form. It is the aspect from the donor's part in the transaction which would seem to be of controlling importance in determining whether a particular gift *inter vivos,* which is not the ordinary absolute gift *in praesenti,* is a transfer in lieu of a testamentary disposition. * * *" (Italics ours.).

The Trust and Spiegel's Will Were Executed Years Apart and Made Different Dispositions.

Spiegel did not intend to resort to an *inter vivos* transfer as a substitute for a will. The record here shows an entirely different intent. See Question 2, *supra,* pp. 16-26. Spiegel's will was drawn 18 years after the execution of the trust and left three-fourths of his residuary estate to one daughter, one-fourth to his other daughter and nothing to his son (R. 117-9). This was a very different disposition from that provided by the trust which gave equal shares to each of the children.[11]

11. A substantial interval of time between the creation of an *inter vivos* trust and the execution of the settlor's will has been held to negative characterization of the trust as a testamentary substitute. See *Wishard* v. *United States,* 143 F. 2d 704, 708 (CCA 7th, 1944)—6 years; *Blakeslee* v. *Smith,* 26 F. Supp. 28, 34 (D. C. Conn., 1939), affirmed, 110 F. 2d 364 (CCA 2d, 1940)—4 years; *Root* v. *United States,* 56 F. 2d 857, 858-59 (D. C. Fla., 1931)—13 months; *Estate of T. M. Flynn,* 3 T. C. M. 1287, 1289 (1944)—4 years; *Estate of M. E. Girvin,* 3 T. C. M. 1290, 1291 (1944), reversed on other grounds, 155 F. 2d 1 (CCA 9th, 1946), certiorari denied 329 U. S. 725 (1946)—8 years; and *Estate of Henry N. Dodge,* CCH Dec. 12,113-H, at p. 35,986 (1941)—8 years. Differences between the disposing provisions of a trust and the settlor's will, likewise, have led courts to decide that a trust is not a substitute for a testamentary disposition. See *Wishard* v. *United States, supra; Blakeslee v. Smith, supra; Root* v. *United States, supra;* and *Estate of M. E. Girvin, supra.*

Reinecke Also Decided This Question.

The fact that the trust terminated at the death of the settlor or that the settlor retained, as a cotrustee and not for his own benefit, administrative control over the trust did not postpone effectiveness of the transfer and did not make it testamentary.[12] See Question 1, *supra*, pp. 9-12; Question 6, *supra*, pp. 28-34. There are no other circumstances in the instant case, which could possibly render the trust akin to a testamentary disposition.

Respondent argued in *Reinecke*, and there specifically presented for decision, the question whether the five *Reinecke* trusts were akin to testamentary dispositions. Respondent's *Reinecke* brief stated (pp. 29-30):

> "* * * it is now necessary to determine whether or not the five trusts of 1919 * * * are *testamentary in character.* * * *
>
> "This Court in that case [*Nichols* v. *Coolidge*, 274 U. S. 531] determined the section [402(c) of the 1918 Act] to be unconstitutional in that it attempted to tax a past lawful transaction which was not testamentary in effect. Such a state of facts is not here present. *The transaction in this case is testamentary.* Under it the settlor retains an interest up to the moment of his death and the passage to the beneficiary of corpus can not take place until the settlor's death.
>
> "This court has described the Federal estate tax as being one imposed upon an 'interest which ceased by reason of death.' *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61. An instrument creating a trust may be so limited in its scope that its execution and delivery do not operate to

12. 1 Scott, Law of Trusts, p. 340, f.n. 2: "If the settlor does not reserve power to revoke the trust, the reservation of power to control the administration of the trust does not make the trust testamentary. See *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 * * *. The power to control in such case is not unrestricted but is limited by the purposes of the trust." See also, *Commissioner* v. *Kellogg*, 119 F. 2d 54, 57-8 (CCA 3d, 1941).

terminate this interest. The transmission is not complete as to the founder until he has parted not only with the title but also with the use, enjoyment, and dominion." (Italics ours.)

Respondent then argued (*Reinecke* brief, pp. 30-31) that, because of retained power of management and control and alleged substantial interest in trust property until the settlor's death, the *Reinecke* trusts were testamentary in character. See pp. 30-31, *supra*. The Court in *Reinecke*, however, rejected the contention and held that the five trusts there involved were *not* testamentary in character and *not* taxable under the counterpart of section 811(c) then in force.

The trust, here before the Court, was an immediate gift of both income and principal of the trust property. It disposed of that property once and for all. Like *Reinecke*, there was nothing about the transfer here which made it akin to a testamentary disposition.

Question 9. What is the effect of the rulings of Helvering v. Clifford (309 U. S. 331) upon these trusts?

Respondent did not base his deficiency claim on any *Clifford* theory (R. 21). He did not contend in the Tax Court (R. 29-30) or the Court of Appeals (R. 135), and has not argued in this Court, that *Clifford* is applicable. This Court said in *Helvering* v. *Fuller*, 310 U. S. 69 (1940):

(p. 76) "As we have seen, respondent did retain considerable control over the trusteed shares. But that was not the basis for the assessment of the deficiency by the Commissioner. It was not passed upon by the Board of Tax Appeals or the Circuit Court of Appeals. It was not included in the petition for certiorari among the errors to be urged or the reasons for granting the writ. Nor did petitioner brief or argue the point here. Hence we do not pass on the applicability of the rule of *Helvering* v. *Clifford*, *supra*, to these facts. Cf. *Helvering* v. *Wood*, 309 U. S. 344."

The Tax Court Held Decedent Was Not the Owner of Trust Corpus.

Be that as it may, the Spiegel trust was not, in any event, a *Clifford* trust for income tax purposes, and is not a *Clifford* trust for estate tax even assuming that *Clifford* principles are applicable to estate taxes.[13] The basis of *Clifford* is set out in the Court's opinion as follows:

(p. 335) "In this case *we cannot conclude as a matter of law* that respondent ceased to be the owner of the corpus after the trust was created. Rather, *the short duration of the trust*, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a).

(p. 336) "* * * Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and *are appropriate foundations for findings on that issue*. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, *we cannot say that the triers of fact committed reversible error* when *they found* that the husband was the owner of the corpus for the purpose of § 22(a). * * *" (Italics ours.)

---

13. In *Clifford*, the Court, referring to the definition of "gross income" in the income tax law. (§ 22(a)), said (p. 334):

"The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. * * * Hence our construction of the statute should be consonant with that purpose."

Apart from any question of constitutionality of application of *Clifford* to estate taxes, the estate tax laws do not evidence the purpose of Congress to use its full power to tax transfers at death. *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, 58-60 (1942), and opinion below, 121 F. 2d 307, 311-313 (CCA 4th, 1941). Further, section 811(c) of the Code applies to specific (not general) transfers and is not comparable to the sweeping coverage of section 22(*a*) of the income tax law. Cf. *Commissioner* v. *Prouty*, 115 F. 2d 331, 337 (CCA 1st, 1940).

The Court, there, refused to hold *as a matter of law* that the finding of the Tax Court (that Clifford was, for practical purposes, owner of the trust income) was erroneous. In the instant case, the Tax Court held (R. 129) that the settlor was not the owner of trust corpus prior to or at the time of his death, and the Court, here, cannot conclude *as a matter of law* that the Tax Court's holding was erroneous.

Spiegel Had No Right to Get Corpus Back.

However, even if this Court would undertake to try the facts *de novo*, it must, we submit, find that the case at bar is not a *Clifford* case. While no one provision is controlling, the "bundle of rights", which, under *Clifford* principles, operates to make income taxable to a settlor, must include the right, among others, to get trust corpus back within a definite and short period.[14] In *Clifford*, the trust terminated in five years or sooner upon the death of either the settlor or his wife (the income beneficiary), and, upon termination, corpus would return to the settlor. Long prior to the *Clifford* decision, short term trusts had been used by taxpayers in order to reduce income taxes.[15] Accordingly, certiorari was granted in *Clifford* (p. 334):

> "because of the importance to the revenue of the United States of the use of such short term trusts in the reduction of surtaxes."

14. Decisions such as *Commissioner* v. *Buck*, 120 F. 2d 775 (CCA 2d, 1941), are not inconsistent. Those cases apply *Clifford* rulings where although the settlor has no right to get corpus back, he has such control over disposition of income and corpus (lacking here) as to make him as much the owner of the trust *res* as if he were entitled to receive it back within a short time.

15. The Tax Court's *Clifford* decision (37 CCH Dec. 10,446 B, 1938, affirmed, 309 U. S. 331) was based upon *Wollman* v. *Commissioner*, 31 B. T. A. 37 (1934); *Rands* v. *Commissioner*, 34 B. T. A. 1107 (1936) and *Corning* v. *Commissioner*, 36 B. T. A. 301 (1937), each of which had decided that the settlor of a short term trust was liable for income taxes on trust income, although he did not actually receive the income.

See *Harrison* v. *Schaffner*, 312 U. S. 579, 583 (1941); *Helvering* v. *Elias*, 122 F. 2d 171, 172-3 (CCA 2d, 1941); *Jones* v. *Norris*, 122 F. 2d 6, 11 (CCA 10th, 1941); *Stuart* v. *Commissioner*, 2 T. C. 1103, 1113 (on remand from Supreme Court, 1943). Cf. T. D. 5488: The Treasury Interpretation of the Clifford Rule, 46 Col. L. Rev. 601, 605-6 (1946).

In the case at bar, Spiegel could never have recovered corpus. Even on Respondent's erroneous theory, he could have received corpus back only if he survived three children and three grandchildren. However, Respondent does not contend that Spiegel retained any *right* (as distinguished from a possibility) ever to get corpus back and it would be utterly unrealistic to include in any "bundle of rights", retained by Spiegel, that remote possibility assuming it existed.

Spiegel's Power to Administer the Trust, as Cotrustee, Did Not Make Him Owner of Corpus for Practical Purposes.

Certainly, decedent's control of administration of the instant trust, as a cotrustee, was not sufficient to make him the owner of the trust property as a practical matter. His control was solely as a fiduciary and not in his own interest, and gave, and under the law could give, no economic advantage to him personally. See *Cushman* v. *Commissioner*, 153 F. 2d 510, 514 (CCA 2d, 1946). See also, Questio. 6, *supra*, pp. 28-34.

In *Commissioner* v. *Branch*, 114 F. 2d 985 (CCA 1st, 1940), the court affirmed the decision of the Tax Court that income of a trust was not taxable to the grantor. In distinguishing the case from *Clifford*, the court said:

> (p. 987) "In common with *Helvering* v. *Clifford*, 309 U. S. 331, * * * the grantor in the present case has made himself trustee with broad powers of management, and named his wife as beneficiary. There the

correspondence ends. *An important feature of the Clifford case was that the trust was of short duration* * * *. *In the Clifford case the corpus would surely revest in the grantor at the end of five years, and maybe sooner.* Here the corpus will revest in the grantor only in the event that he outlives his wife, and even this possibility of reverter is subject to be extinguished if the wife exercises her power to appoint the trust estate to new uses or to terminate the trust and to vest the corpus in herself. * * *

"*Helvering* v. *Clifford* rests on its particular facts, as the court was careful to say. * * * *Where the grantor has stripped himself of all command over the income for an indefinite period, and in all probability, under the terms of the trust instrument, will never regain beneficial ownership of the corpus, there seems to be no statutory basis for treating the income as that of the grantor under Section 22(a) merely because he has made himself trustee with broad power in that capacity to manage the trust estate.* * * *" (Italics ours.)

In the case at bar, as in *Branch*, corpus could never revest in the grantor or, on Respondent's theory, only upon the happening of a contingency which almost certainly would not (and, in fact, did not) occur. At most, in the instant case, the settlor retained power to administer the trust estate as a cotrustee.

In *Dunning* v. *Commissioner*, 36 B. T. A. 1222 (1937), the Commissioner urged that the petitioner there was taxable as the owner of trust income (in fact payable to his wife) because of his retained control over the trust. The trustees were the grantor and a trust company. The Tax Court, holding that the settlor's retained control was not sufficient to render him owner of the trust income, said (pp. 1227-28):

"We do not believe that petitioner could be taxed upon the income of a trust only because he made himself a trustee, or one of the trustees, and the powers to supervise the investment of trust property, to sell

and reinvest trust property, to vote stock held by the trust, and to generally manage the trust property are all part of the normal powers of a trustee. Petitioner perhaps had more confidence in his own judgment in these matters than he had in the judgment of the co-trustee, a trust company, and his assignment of these powers to himself as trustee to the exclusion of the other trustee does not appear to be a reasonable ground for sustaining the first contention of the respondent. * * *"

In *Estate of Downe* v. *Commissioner*, 2 T. C. 967 (1943), the Commissioner had included the value of the corpus of two trusts in gross estate for estate tax purposes. The grantor was not trustee but had reserved the right to require the trustee to issue proxies, and to retain, sell, exchange, invest and reinvest any of the trust property, in such manner as the settlor might direct. The Tax Court held that the corpus of the trusts was not properly included in gross estate, saying:

(p. 974) "The third ground for respondent's contention that the trust corpus should be included in the estate of decedent is that decedent retained such economic control over the corpus that he must be regarded as the owner thereof within the rule announced in *Helvering* v. *Clifford*, 309 U. S. 331; and that therefore the value of the corpus is includable in decedent's estate under section 302(a) and (c) of the Revenue Act of 1926, as amended.

"We think that this ground is also untenable under the reasoning and holdings in *Commissioner* v. *Branch*, 114 Fed. (2d) 985; *Emma B. Maloy, supra*; and *George H. Whitely*, 2 T. C. 618. * * *

"While the *Branch* and *Maloy* cases just above cited involved income and not estate tax, the fundamental and essential question for decision in each was whether the grantor of a trust should be regarded as the owner of the corpus within the rule of the *Clifford* case. In each case the solution of this question depended alone upon the effect of a provision of a trust instrument

involved whereby the grantor (individually in the *Maloy* case, and as cotrustee in the *Branch* case) retained control of sales, investments, and reinvestments of the trust property as did the decedent, grantor, here. The effect of this provision was the only ground assigned by the Government in those cases for the application of the rule in the *Clifford* case, and assuming, although not so deciding, that the rule in the *Clifford* case is applicable here under section 302(a) and (c) of the Revenue Act of 1926, as amended, we, for similar reasons as stated in the *Maloy* case, reach the same conclusion as to the trust corpus here involved, as was there reached as to the trust there involved *i. e.*, that the trust corpus here does not come within the operation of the rule announced in the *Clifford* case and that consequently its value is not includable in decedent's estate by reason of that rule."

The Trust at Bar Was Not a Clifford Trust Even for Income Tax Purposes.

So far as income taxes are concerned, the instant trust would not be a *Clifford* trust under Respondent's Regulations. Section 29.22(a)-21 of Regulations 111 provides, generally, that income of a trust is taxable to the grantor, although not payable to him, if he retains control of the trust so complete that he is, in practical effect, still the owner of the income. The Regulations go on to state (section 29.22(a)-21(b)) that, in conformity with the practical ownership principle, income of a trust is attributable to the grantor if:

"(1) the corpus or the income therefrom will or may return after a relatively short term of years * * *;

(2) the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition * * *, whether by revocation, alteration or otherwise, exercisable by the grantor, or another person lacking a substantial adverse interest in such disposition, or both * * *; or

(3) the corpus or the income therefrom is subject to adminstrative control, exercisable primarily for the benefit of the grantor * * *."

Neither corpus nor income of the instant trust could have returned to Spiegel after a "relatively short term of years" or, we submit, ever. "Beneficial enjoyment" of neither corpus nor income was subject to any power of disposition by the settlor. Neither corpus nor income was subject to any adminstrative control "exercisable primarily" (or to any extent) for the benefit of the settlor.[16] Thus, although the Regulations have stretched *Clifford* to (or beyond) the breaking point, they still do not purport to tax a trust such as the Spiegel trust.[17]

Clifford principles, even if applicable to estate taxes, would not apply to the instant case because the most essential of the elements, making up the bundle of rights which renders a grantor taxable on income of a trust—the right to get a corpus back within a definite, short period—is lacking. Further, such control as Spiegel had as a co-trustee was not exercisable by him for his own benefit, gave him no economic interest in corpus and was clearly insufficient to render a decedent-settlor taxable under section 811(c) of the Code. This Court (on the authority of *Clifford*) said in *Helvering* v. *Stuart*, 317 U. S. 154 (1942):

(p. 169) "* * * broad powers of management in trustees, even though without adverse interest, point to complete divestment of control, as does the impossibility of reversion to the grantors."

16. See Reg. 111, § 29.22(a)-21(e) and pp. 32-33, *supra*, for examples of control exercisable primarily for the benefit of the settlor personally. See also, T. D. 5488: The Treasury Interpretation of the Clifford Rule, 46 Col. L. Rev. 601 (1946).

17. Respondent was applying the principles, recognized in *Clifford*, during years at least as early as 1930. See *Woilman* v. *Commissioner*, 31 B. T. A. 37 (1934). Nevertheless, no claim was made, during Spiegel's lifetime, that he was liable for income taxes on the trust income.

CONCLUSION.

Spiegel, at his death, had no interest or possibility of interest in the trust property and, accordingly, corpus of the trust may not be included in gross estate for estate tax purposes. However, even if the Court should hold that he retained a remote possibility of reverter by operation of law, nevertheless corpus should not be included in gross estate since the record here is clear that decedent did not intend to retain any interest or possibility of interest in the trust property and, therefore, did not make a transfer intended to take effect only at death. It is not even claimed that he retained any interest of substance.

Petitioners do not seek to take advantage of refined technicalities of the law of property. Our position is that, since Spiegel, at his death, retained no interest in the trust property, his estate is not liable for estate tax on account of a non-existent interest. The estate is not sheltering itself behind technicalities when it argues that it should not be taxed on account of *nothing*. The "technicality" shoe is on the other foot. It is only after conjuring up a remote (and non-existent) possibility of reverter by operation of law—a refined technicality if ever there was one—that Respondent claims to find that decedent had an interest in corpus at the date of his death.

Substance and not form should prevail. As the dissenting Justices said, in *Goldstone v. United States*, 325 U. S. 687, 694:

> "We have recently been told that the question whether, within the intent of the Revenue Acts, a transfer is 'intended to take effect in possession or enjoyment at or after' the grantor's death is to be decided not by the terminology of conveyancing or the ancient real property law respecting vested and contingent estates, possibilities of reverter, and the like.

> We have been warned that the taxpayer and his estate must have regard to substance rather than to form, in answering the question whether the transfer becomes complete only at the transferor's death. I have assumed that the tax gatherer could not ignore the same test.* * *"

As a matter of substance, Spiegel, at his death, did not, on any theory, have any interest in corpus. His estate should, accordingly, not be taxed on account of that corpus.

The order of the Court of Appeals should be reversed and the Tax Court should be affirmed.

Respectfully submitted,

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September 15, 1948.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF ON REARGUMENT.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM,
LOUIS A. KOHN, and
JOSEPH M. WEIL,
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PETITIONERS' REPLY BRIEF ON REARGUMENT.

Petitioners believe that their Supplemental Brief, filed on reargument, adequately joins issue with Respondent on the questions put by the Court. However, Respondent has filed a single consolidated brief in both the instant case and *Estate of Francois L. Church*, deceased, No. 5, October Term, 1948, and this Reply Brief is filed primarily to keep clear the factual differences between the *Spiegel* and *Church* cases and the different legal consequences which may flow from such factual differences. In addition,

this brief will amplify certain arguments made in our Supplemental Brief.

Facts Distinguishing Spiegel and Church Cases.

Spiegel retained no interest in the income of the trust he created. The income was, from the beginning, paid to or for the benefit of his three children. Church reserved the income of his trust during his lifetime.

Spiegel's three children (the beneficiaries) were alive in 1920 when the trust was set up. They were alive at Spiegel's death in 1940, when the corpus of the trust was distributed to them. Church, at no time, had any children although, if he had had a child, the child would have become a beneficiary of the Church trust.

Spiegel had no power to name a substitute trustee in the event of a vacancy. Church had that power in connection with his trust.

At Spiegel's death and for many years prior thereto, the trust estate consisted of a widely diversified portfolio of stocks and bonds—138 different items at date of death. The Church trust estate consisted, at all times, of stock in a single company.

These facts must be kept in mind in considering Respondent's brief. They serve substantially to distinguish the *Spiegel* from the *Church* case.

Reinecke Should Not Be Overruled.

Respondent's brief is based, so far as the *Spiegel* case is concerned, principally upon his argument that any trust which is distributable upon the death of a settlor necessarily takes, and is intended to take, effect at the death of the settlor and is taxable. Hence, Respondent argues that *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, incorrectly

decided that the Federal estate tax does not apply to an *inter vivos* transfer by which a decedent relinquishes all interest in the trust property, retaining no interest which could cease upon his death.

Fundamentally, Respondent's argument is founded (Br. 22) upon the unsound conclusion that *Reinecke* must fall with the *St. Louis Trust Co.* cases which were overruled by *Hallock*. In our Supplemental Brief (pp. 13-14), we have shown that the dissenting Justices in the *St. Louis Trust Co.* cases based their decision on *Reinecke*. Further, Respondent, himself, did not always believe that *Reinecke* and the *St. Louis Trust Co.* cases must fall together and, in his *Hallock* brief (pp. 24-25), he said:

> "We respectfully submit that when Congress spoke of transfers 'intended to take effect in possession or enjoyment' at or after death, it was simply undertaking to tax transfers that were substitutes for testamentary dispositions, and that it never intended to revivify medieval concepts of property law as a basis for determining taxability. The decisions in the *St. Louis Trust Co.* cases to the contrary stand out in striking contrast to the realistic approach in such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *Porter* v. *Commissioner*, 288 U. S. 436, and the *Klein* case, where the shifting of economic benefits at death was held to be sufficient ground upon which to base the tax."

Certainly, Respondent was not urging the Court in *Hallock* to overrule *Reinecke*. (cf. pp. 9-10, *infra*.)

In support of his argument here, Respondent states (Br. 5-9) that the phrase "intended to take effect in possession or enjoyment at or after death" had a history derived from prior state and Federal inheritance and succession taxes, and that that history was adopted by Congress in the first estate tax law, passed in 1916. If Respondent's argument is intended to give the impression that the decisions under state laws were uniform to the effect that a

trust, such as the Spiegel trust (where neither income nor any other interest was retained by the settlor) was taxable as intended to take effect in possession or enjoyment at death, we submit that the argument is not supported by the decisions.

Although state decisions on inheritance or succession tax laws had little, if any, relevancy on the question of construction of the very different estate tax before the Court in *Reinecke* (see Petitioners' Supplemental Brief, pp. 10-11), nevertheless a trust, such as the one before the Court here, would not have been taxable in 1916, or today, under the statutes of many states. Illinois would not hold the trust taxable. *People* v. *Northern Trust Co.*, 330 Ill. 238, 246-8 (1928); *People* v. *McCormick*, 327 Ill. 547, 553, 556 (1927). Likewise, neither Delaware, Michigan, Minnesota, Ohio, Pennsylvania nor Wisconsin would tax the Spiegel trust. See *Highfield* v. *Equitable Trust Co.*, 155 Atl. 724 (Del. Super. Ct., 1931); *State* v. *Welch's Estate*, 209 N. W. 930 (Mich., 1926); *In re Marshall's Estate*, 228 N. W. 920 (Minn., 1930); *Chase* v. *Commissioner*, CCH State Inheritance, Estate and Gift Tax Service (7th Ed.) Dec. No. 16,186 (Minn. B. T. A., 1947); *In re Thompson's Estate*, 68 N. E. 2d 71 (Ohio, 1946); *In re Hazelton's Estate*, 73 N. E. 2d 799 (Ohio, 1947); *In re Dolan's Estate*, 124 Atl. 176 (Pa., 1924); *In re Townsend's Estate*, 36 Atl. 2d 438 (Pa., 1944); *In re Glosser's Estate*, 49 Atl. 2d 401 (Pa., 1946); *In re Prange's Will*, 231 N. W. 271 (Wis., 1930).

Respondent refers (Br. 7, f. n. 3) to his brief in *Hassett* v. *Welch* for a collection of state court authorities on the question. The decisions cited in the Government's *Hassett* brief (p. 22), are stated to stand for the proposition that— (pp. 20-22)

> "* * * such state courts as have had occasion to construe this clause, both before and after the enactment of the Federal law in 1916, have uniformly treated it as including a transfer *in which the transferor has*

retained a life estate, either in form or in substance." (Italics ours.)

While state courts have quite generally held a trust, under which the settlor retains income for his life, to be a transfer intended to take effect in possession or enjoyment at or after death, such decisions have no relevancy here since Spiegel retained no interest in the trust property. It is significant, in this connection, that Respondent's *Reinecke* brief cited no state court authority, holding taxable a trust under which the settlor retained *no* interest (and the *Reinecke* settlor retained no interest).

Respondent cites (Br. 8) *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, for the proposition that the words "enjoyment" and "enjoy" are not terms of art but connote substantial present economic benefit rather than technical vesting of title or estates. In the *Holmes* case, the beneficiaries had no right to immediate enjoyment of income, and the settlor retained the right to terminate, alter or amend the trust. We, accordingly, fail to see the bearing of the *Holmes* case on the case at bar.

Respondent seeks (Br. 11, f. n. 4) confirmation of what he alleges to be Congressional purpose not to confine the statute to "transfers" *from* a decedent at his death in the statutory provision for inclusion in gross estate of interests held jointly by a decedent and another. However, the right of survivorship, inherent in joint tenancies, is certainly a substantial right retained by each joint tenant until his death. Until death, the right of each tenant to succeed to ownership of the entire property does not cease. See *United States* v. *Jacobs,* 306 U. S. 363, 370-71. The joint tenancy cases thus aid the *Reinecke* construction.

In any event, Respondent recognizes that one, who has the income from trust property, has both possession and enjoyment of that property, for he says here (Br. 25):

> "* * * In the *Church* case, the decedent retained during his lifetime the income from the property, that is, *the actual possession and enjoyment* of the property, and hence *the actual possession and enjoyment* of the property could not possibly take effect in the remainderman until his death; * * *." (Italics ours.)

Surely, it must follow that, since the Spiegel *beneficiaries* received, immediately and during Spiegel's lifetime, all income from the property ("that is, *the actual possession and enjoyment of the property*"), the actual possession and enjoyment of the property passed to, and took effect in, the beneficiaries upon the creation of the Spiegel trust.

If the Court's first question is answered in the affirmative, a trust would be taxable upon the death of the settlor if, thereunder, income is to be paid to A (whether relative or stranger) during the life of the settlor and, upon the settlor's death, corpus is to be paid to B, or, if B is not alive, to C, or, if C is not alive, to D, and so on, with a final remainder to the American Red Cross or the United States Government. Such a result would not be justified by any decision of the Court, and is not within the intent of Congress.

Respondent urges (Br. 21, f. n. 8) that overruling *Reinecke* would not be unfair to Petitioners, because, when the Spiegel trust was created, there was outstanding a Regulation which, he argues, made it clear that a retained interest was not indispensable to taxability. His reference is to Article 24 of Regulations 37. The Regulation (only a portion of which is quoted by Respondent—Br. p. 7—and which deals with taxability of transfers involving retained income) says no more than that there can be transfers, intended to take effect in possession or enjoyment at death, even though the transferor has retained no income. This is, of course, true provided the settlor retains some other interest, as typified by the *Hallock* type of cases. It is

clear that the Regulation did not purport to tax a transfer, in connection with which the settlor has retained no interest whatsoever, since it provided that "where the grantor reserves a proportionate part of income, only a corresponding proportion of the property should be included in the gross estate", unless the transfer is in contemplation of death. Thus, taxability was based solely upon the interest *retained* by the grantor. If, however, the Regulation (or the appended Example) provided, as Respondent contends, that there could be a taxable transfer, intended to take effect at death, where the transferor retained neither income nor any other interest in the transferred property, then it does not represent the law in 1920 or today or at any time in between.

In any event, Respondent's argument on fairness, based upon his construction of the Regulation, at best, boils down to this:

> Spiegel should have known in 1920 that, in 1948, the Court would say that it had been in error when, in 1929, it said that the Example did not represent the law.

The statement of the proposition should refute it.

We submit that the *Reinecke* construction of present section 811(c) was correct, was relied upon and confirmed by the dissenting Justices in the *St. Louis Trust Co.* cases and by the Court in *Hallock*, has been confirmed by Congress, and should not now be overruled. See Petitioners' Supplemental Brief, pp. 9-12.

Respondent's Argument Deletes "Intended" from Section 811(c).

Having overruled *Reinecke* and concluded that, under section 811(c), any trust is taxable if it terminates or is distributable at the death of the settlor, Respondent is

given little trouble by the word "intended." He argues that, if a trust terminates at death, that fact, alone, makes the transfer take effect at death and, of course, it must be intended that it terminate at that time. On Respondent's construction, existence or non-existence of a reversion, reverter or any other interest at death becomes of no consequence. We do not believe, however, that the Court will so hold and, so long as *Reinecke* and *Hallock* stand, the word "intended" must be given meaning. If it is not given effect, the statute will mean the same as if the word "intended" had been omitted. See Petitioners' original Brief pp. 36-38.

Respondent has not always deleted the word "intended" by construction. In 1920, when the Spiegel trust was created and for some time thereafter, the Regulations provided that a transfer was taxable "when * * * *intended* to take effect in possession or enjoyment at or after * * * death." Regulations 37 (as amended to December 29, 1919), Article 22. At first blush, this Regulation might seem merely to set out the words of the statute and to throw no light upon the meaning to be given "intended". The Bureau, however, during the period prior to the passage of the Revenue Act of 1924 (which added the counterpart of section 811(d) of the Code, dealing with revocations and similar powers), had construed the provisions of Revenue Acts (which were equivalent to section 811(c) of the Code) as taxing all transfers, which were subject to revocation, alteration or amendment by the donor, even though there was no express reference in the earlier statutes to transfers thus subject. See Regulations 37, Article 25. By T. D. 3487 promulgated in 1923, Respondent amended Article 25 of Regulations 37 to read:

> "Where a transfer by trust or otherwise is subject to revocation by the donor, or the terms thereof may be altered or amended by him, or he reserves to himself the right to take or assume either full or partial con-

trol of the transferred property, or to direct or control the management thereof, *all facts and circumstances bearing upon the donor's intent are to be considered, and if it appears that he intended the transfer to take effect in possession or enjoyment at or after his death,* then the value of the transferred property should be included in the gross estate, unless it further appears that the transfer was a bona fide sale for a fair consideration in money or money's worth." (Italics ours.)

The Treasury Decision, thus, made it clear that the use of the word "intended" by Respondent in the early Regulations was for the purpose of basing liability for tax upon the actual intention of the settlor, as later required by *United States* v. *Wells,* 283 U. S. 102 (1931). The Regulations, as amended by the Treasury Decision, read very much the same as the decisions of the Tax Court. See Petitioners' original Brief pp. 39-40 and Supplemental Brief p. 17.

We submit that the word "intended" in the statute must be given meaning and that, if a transfer was not intended to take effect at death but immediately, it is not taxable under section 811(c).

Overruling May v. Heiner Would Not Affect Reinecke.

Respondent seeks to give the impression that, if *May* v. *Heiner* is overruled, *Reinecke* v. *Northern Trust Co.* must fall with it. He states (Br. 22) that *May* v. *Heiner* is based largely on *Reinecke,* and that (Br. 23) *Reinecke* and *May* v. *Heiner* were placed on a common ground. However, in *Reinecke* (unlike *Heiner*), the settlor retained no income or other right in the trust estate. Fundamentally, the only relationship between *Reinecke* and *Heiner* is that *Heiner* cited and relied upon *Reinecke,* but, as said in Paul, Federal Estate and Gift Taxation—1946 Supplement (p. 152):

"In the former case [*Reinecke*] the Court held that a transfer in trust was not taxable under subsection (c) where the grantor created an interest in income for the benefit of another person, possibly terminable five years after the grantor's death, with remainder over to another. * * * Clearly this situation is distinguishable from a trust reserving a life estate in the grantor, which necessarily postpones the passing of the decedent's enjoyment of the property until death. Certainly the mere fact that Mr. Justice McReynolds cited the *Northern Trust Company* decision in *May* v. *Heiner* does not make the two decisions inseparable companions. Authorities cited by an erroneous decision are not necessarily interred together with it, for the error generally inheres in a misuse of the authorities."

The Courts of Appeal hold that *Hallock* is consistent with *Reinecke* and, hence, that *Reinecke* is still law. See Petitioners' Supplemental Brief p. 14, f. n. 5. Further, all members of the Court in *Helvering* v. *Proctor*, 140 F. 2d 87 (CCA 2d, 1944), although they differed on other questions, agreed that repudiation of *May* v. *Heiner* would not logically call for repudiation of *Reinecke*.

A Trustee May Not Act for His Own Benefit.

Respondent argues (Br. 41, f. n. 20) that, although a trustee owes certain fiduciary obligations to beneficiaries, he may exercise his fiduciary powers in his own interest where there is no violation of the beneficiaries' rights. He cites *Reinecke* v. *Smith*, 289 U. S. 172, for this proposition. The *Smith* decision held only that a trustee is not a fiduciary with respect to a power to revoke in conjunction with the settlor, and, therefore, owes no duty to resist revocation of the trust. The Court, however stated (p. 176-7):

"Of course he owes a duty to the beneficiary to protect the trust *res*, faithfully to administer it, and to distribute the income; but the very fact that he participates in the right of alteration or revocation negati[illegible]

any fiduciary duty to the beneficiary to refrain from exercising the power."

Spiegel had no right, either alone or in conjunction with anyone, to revoke or modify the instant trust, and we fail to see the relevancy of the *Smith* decision.

Instant Trust Does Not Resemble a Testamentary Disposition.

Respondent argues (Br. 51) that the position of the beneficiaries under the Spiegel trust was similar to that of a legatee of a will whose legacy might lapse by his death prior to the testator. There is, however, little similarity between a legatee, who must wait for his legacy until the death of the testator, and the Spiegel beneficiaries who, for more than twenty years while Spiegel was living, received income from over $1,000,000 of securities and whose heirs or legatees were bound to receive trust corpus if the beneficiaries did not.

Further and more important, the position of Spiegel and that of a testator could hardly be more dissimilar. Spiegel gave away all rights to the trust property twenty years before he died. He received none of the fruits thereof and he had nothing more to say about the disposition thereof. There was nothing about the Spiegel trust which made it akin to a testamentary disposition.

We submit that the Court of Appeals should be reversed and the Tax Court affirmed.

Respectfully submitted,

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October 8, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

ESTATE OF SIDNEY M. STRICK, DECEASED, ET AL.,
ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1144

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 126–129) are not reported. The opinion of the Circuit Court of Appeals (R. 151–158) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159), and a petition for rehearing was denied on January 23, 1947 (R. 201). The petition for a writ of certiorari was filed on March 21, 1947. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under Illinois law, the decedent had a reversionary interest by operation of law with respect to the property he transferred in trust in 1920.

2. If so, whether the value of the trust property is includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after his death.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pp. 12–14.

STATEMENT

The pertinent facts as stipulated (R. 25–26) and found by the Tax Court (R. 126–129) may be summarized as follows:

Petitioners are the executors of the estate of Sidney M. Spiegel, who was born on August 16, 1872, and died testate on December 19, 1940. The decedent left surviving him two daughters, Katherine J. Spiegel, born March 1, 1897, and Julia S. Michels, born March 7, 1907, a son, Sidney M. Spiegel, Jr., born August 8, 1904, and three grandchildren, Robert Michels, Jr., born

August 21, 1930, Helen Katherine Michels, born November 17, 1936, and Sydney Ann Michels, born November 14, 1938. (R. 126.)

On January 2, 1920, the decedent executed a trust agreement under which he transferred to himself and Modie J. Spiegel as trustees, 625 shares of Spiegel's House Furnishing Company and 750 shares of Spiegel May Stern Company. The trust agreement provided that during the life of decedent the trust income was to be divided into three parts and paid or used for the maintenance, support and education of each of decedent's three children and that, in the event any of the decedent's three children predeceased the decedent, the share of the deceased child was to go to his or her children and, if none, to the surviving children of decedent and their descendants, *per stirpes*. (R. 126–127.) The provisions for distribution of the trust income and corpus were as follows (R. 86–87):

> 2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katharine J. Spiegel, Sidney M. Spiegel, Jr. and Julia K. Spie-

gel,—such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

Paragraph 6 of the trust instrument provided (R. 87):

> 6. None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

The property was delivered to and accepted by the trustees on the date of the trust agreement (R. 128).

Until the death of the grantor, the income of the trust was distributed to or for the benefit of the grantor's three children. Following the death of the grantor, the entire corpus and accumulated income were distributed equally to the grantor's three children. (R. 128.)

No part of the corpus held by the trustees at the grantor's death was included in the gross estate shown on the estate tax return filed by the executors of the grantor's estate, which showed a tax of $180,404.41. This amount was paid on March 19, 1942. In recomputing the estate tax, the Commissioner included in the decedent's gross estate $1,140,606.30, the fair market value of the entire trust corpus, and accumulated income held by the trustees on December 19, 1940, the agreed date for the purposes of Section 811 (j), Internal Revenue Code, of the distribution of the property of the three beneficiaries. (R. 128.)

The transfers of the property to the above trust on January 2, 1920, were not made in contemplation of death (R. 128).

On the basis of these facts, the Tax Court held that the value of the trust was not includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code. This holding was based on the Tax Court's conclusion that, in creating the trust, the decedent had retained no "string or tie" amounting to a possibility of reversion and that, therefore, the doctrine of *Helvering* v. *Hallock,* 309 U. S. 106, and decisions derived from it, are inapplicable (R. 129). The Circuit Court of Appeals reversed, holding that the decedent had a reversionary interest by operation of law which required the inclusion of the value of the trust property in his gross estate (R. 151–158).

DISCUSSION

1. Five circuit courts of appeals, the court below included, have held that a reversionary interest, commonly described as a possibility of reverter by operation of law, is sufficient to support taxability under Section 811 (c) of the Internal Revenue Code. *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946; *Thomas* v. *Graham,* 158 F. 2d 561 (C. C. A. 5th); *Beach* v. *Busey,* 156 F. 2d 496 (C. C. A. 6th), certiorari

denied, January 6, 1947. Nevertheless, the Tax Court refused to follow these decisions when, in *Estate of Hughes* v. *Commissioner*, 7 T. C. 1348, another case involving a possibility of reverter by operation of law, it held that the decedent's transfer in trust was not taxable under Section 811 (c) and recognized that its decision was in conflict with *Commissioner* v. *Bayne's Estate, supra*. Further, while three of the above-mentioned decisions of the circuit courts of appeals, including the decision below, have been reversals of the Tax Court on appeals by the Commissioner, the Circuit Court of Appeals for the Third Circuit recently held in *Commissioner* v. *Estate of Church*, decided March 17, 1947 (1947 P-H, par. 72,389) another of these cases involving a possibility of reverter by operation of law, that the Tax Court's decision, holding that the decedent's *inter vivos* transfer in trust was not taxable under Section 811 (c), was conclusive under this Court's decision in *Dobson* v. *Commissioner*, 320 U. S. 489. In the present case, the court below stated that the question presented was a pure question of law and reviewable. (R. 158). Accordingly, although the decisions of this Court in *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Estate of Field*, 324 U. S. 113, would seem to have sufficiently pointed the way for decision in these cases on both the question of taxability and of

reviewability, the presently existing circumstances require a specific decision by this Court on both questions.

2. Review would not seem to be warranted, however, of the ruling of the court below that the decedent had a possibility of reverter by operation of Illinois law. There is no conflict of decisions on that aspect of the case. While *Laehenmeyer* v. *Gehlbach*, 266 Ill. 11, much stressed by petitioner, would seem to indicate that the remainder interests under the trust created by the decedent were vested, none of the decisions cited by petitioner supports its contention that a vested remainder, subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman when the divesting condition occurs. Indeed, *Routt* v. *Newman*, 253 Ill. 185, approved and relied upon in *Glaser* v. *Chicago Title & Trust Co.*, 393 Ill. 447, looks the other way, and affords substantial confirmation for the view of the court below that upon divestiture of the remainder interests and failure of the gifts over, the trust corpus would have reverted to the decedent. In that case, it was held that certain trust income reverted to the testator's estate as intestate property under circumstances similar to those which might have occurred in the present case. Particular reliance was placed on a provision of the trust instrument precluding the beneficiaries from anticipatorily

assigning or otherwise transferring any payments to them. The instant trust instrument contains a like provision, as shown in the Statement, *supra*, p. 5. Petitioner concedes (Pet. 16–17) that the decedent would have had a possibility of reverter by operation of Illinois law if the remainders to the decedent's children were contingent remainders. And it is significant in this connection that the Supreme Court of Illinois has several times stated that the question whether a remainder is contingent or vested subject to divestment by the death of the remainderman prior to the death of the life tenant is not of importance, because for all practical purposes they are the same. See *Knight* v. *Pottgieser*, 176 Ill. 368, 376; *Cummings* v. *Hamilton*, 220 Ill. 480; *Baley* v. *Strahan*, 314 Ill. 213, 219–220.[1]

Whether there was here a possibility of reverter by operation of law is a question determinable solely under Illinois law. In the absence of a showing of plain error, this Court should "leave undisturbed the interpretation placed upon purely local law * * * by three circuit judges whose circuit includes" Illinois. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281. Because, under the Tax Court's view, see R. 129, the exist-

[1] In *Baley* v. *Strahan*, *supra*, the principle was held inapplicable to a case in which the question was whether the remainder interest could be sold, since, if it was a contingent remainder, it could not be sold and, if a vested remainder, it could be sold.

ence of a possibility of reverter by operation of law was irrelevant, that court made no determination on this aspect of the case. Consequently, there is not even a problem here as to whether to "prefer the view of the Board of Tax Appeals concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced." *Helvering* v. *Stuart,* 317 U. S. 154, 164. Finally, the local law aspect of this case is plainly of no general importance, each case turning, as it must, on its own facts. *Glaser* v. *Chicago Title & Trust Co., supra.*[2]

---

[2] Since, in the instant case, the decedent had created a trust which was to endure for the period of his own life, had made himself trustee with power, together with Modie J. Spiegel, to manage the trust corpus (R. 86), had provided for the distribution of the trust outright at his death, and had provided for distribution of both trust income and corpus to blood relatives, he could hardly have intended that, upon a failure of the trust during his lifetime, the remainders to his children were not only to be accelerated and enlarged but were to vest indefeasibly, free from his control, in persons who might not be his blood relatives. While the attorney who drew the trust instrument testified that decedent intended that the property "should be transferred to the trustees for the benefit of his children, and that he wanted at no time to have any interest or title to the property" (R. 34), decedent's intent must be gathered from the terms of the trust instrument. He may perhaps have believed that at least one of his children or one of the descendants of one of them would survive him, and that for that reason he had retained no interest in the trust property, but this is no indication that he intended that if none of the children or their descendants survived him, the trust property was to go to his children's heirs or appointees.

CONCLUSION

Certiorari, if granted, should be limited to the question whether the court below was correct in, and not precluded from, holding that decedent's so-called possibility of reverter by operation of law requires the inclusion in his gross estate, under Section 811 (c) of the Internal Revenue Code, of the value at his death of his *inter vivos* transfer in trust. This case does not call for review of the further question whether, under Illinois law, the decedent had a so-called possibility of reverter by operation of law.

Respectfully submitted.

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APRIL 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17. [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in pos-

session or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's

death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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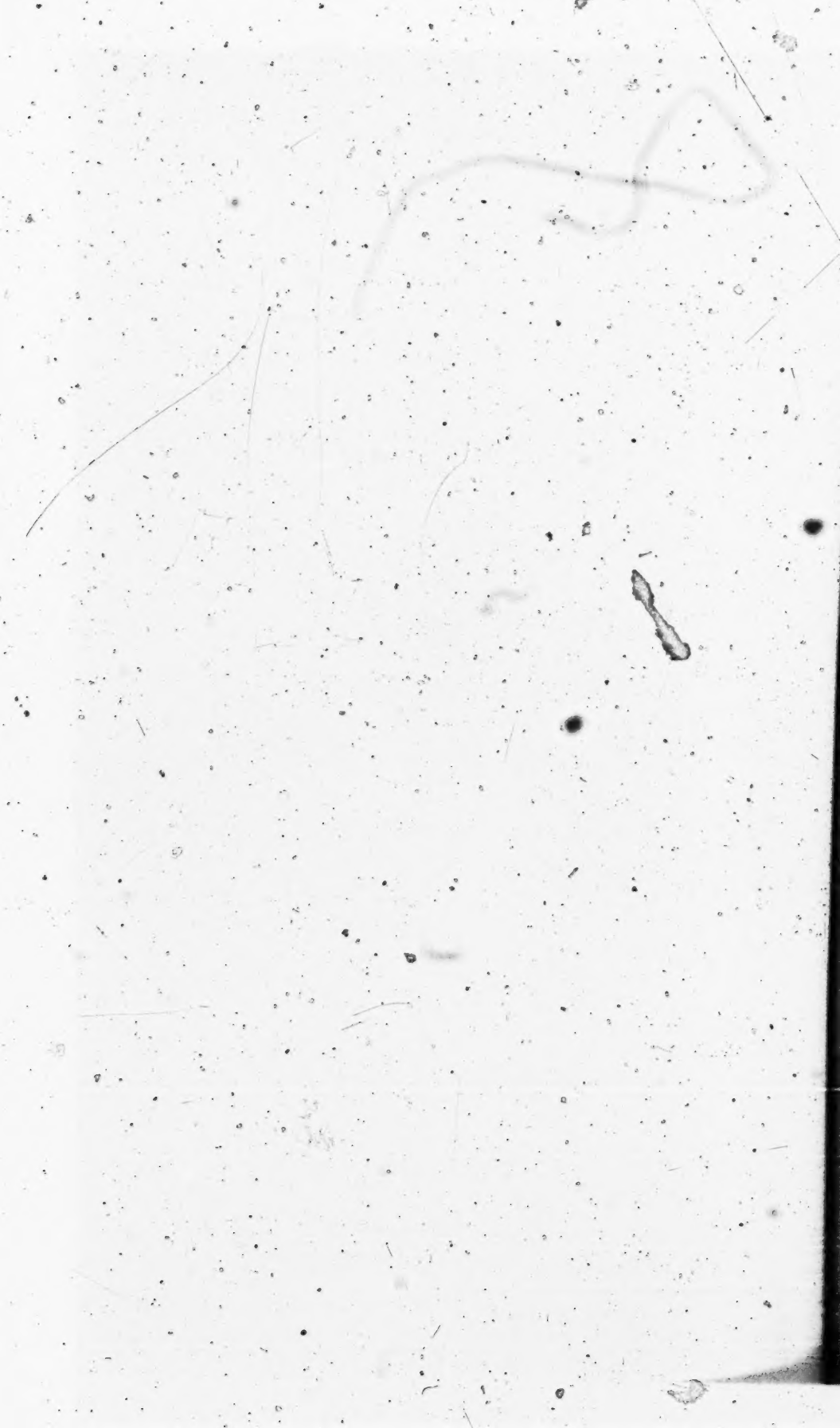

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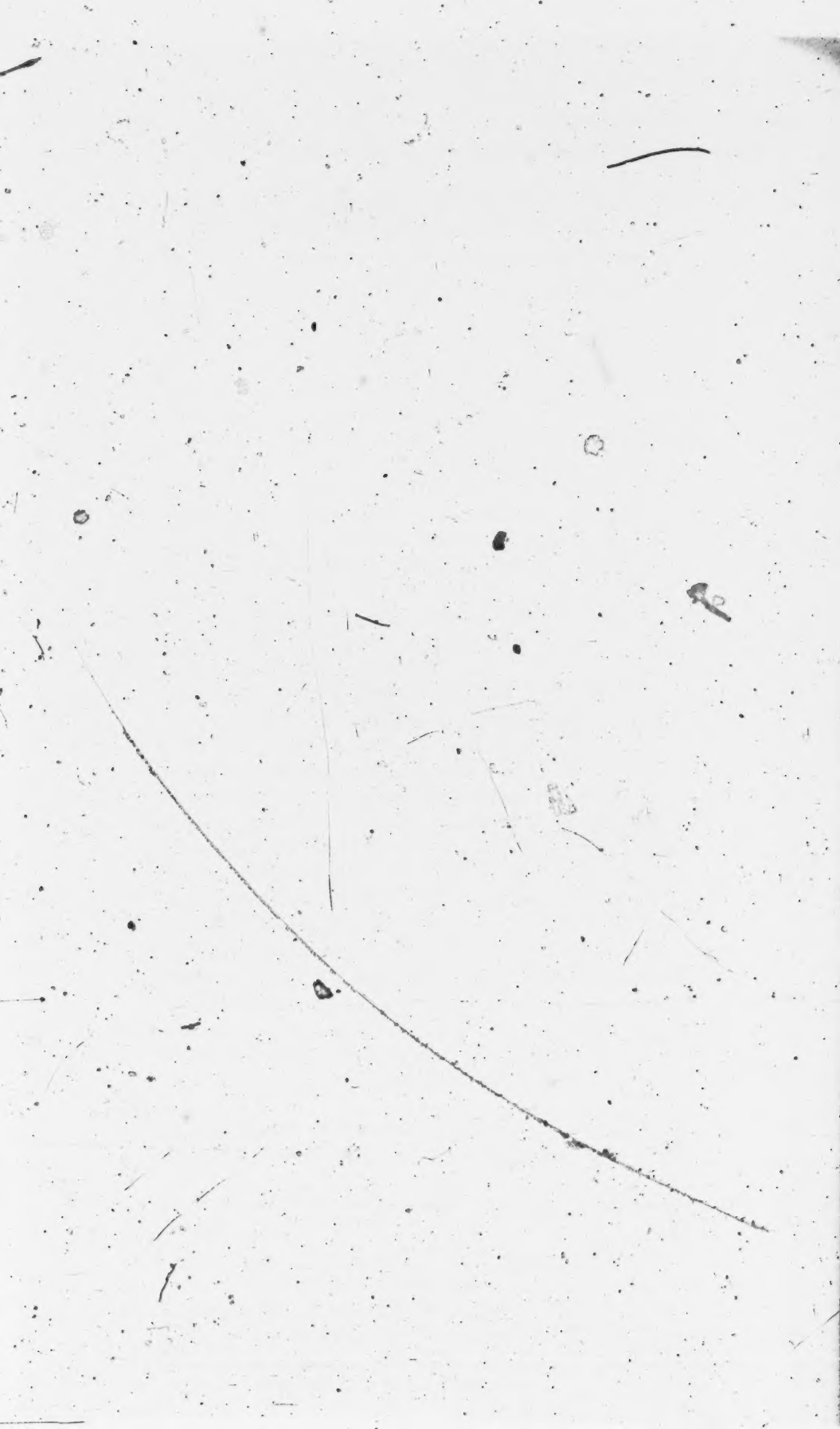

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 52

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 129) is not reported. The opinion of the Circuit Court of Appeals (R. 151–158) is reported in 159 F. 2d 257.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1946. (R. 159.) The petition for a rehearing was denied on January 23, 1947. (R. 201.) The petition for a writ of certiorari was filed on March 21, 1947, and was granted on April 28, 1947. (R. 211.) The juris-

diction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under Illinois law, the decedent had a possibility of reversion with respect to the property he transferred in trust in 1920.

2. If so, whether the value of the trust property is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, which applies to a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

3. In the circumstances, did the Circuit Court of Appeals have power to reverse the Tax Court's decision that the transfer was not taxable?

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set out in the Appendix, *infra*, pp. 30–32.

STATEMENT

The pertinent facts as stipulated (R. 25–26) and found by the Tax Court (R. 126–129) may be summarized as follows:

Petitioners are the executors of the estate of Sidney M. Spiegel, who was born on August 16, 1872, and died testate on December 19, 1940. The decedent left surviving him two daughters, Katherine J. Spiegel, born March 1, 1897, and Julia S.

Michels, born March 7, 1907, a son, Sidney M. Spiegel, Jr., born August 8, 1904, and three grandchildren, Robert Michels, Jr., born August 21, 1930, Helen Katherine Michels, born November 17, 1936, and Sydney Ann Michels, born November 14, 1938. (R. 126.)

On January 2, 1920, the decedent executed a trust agreement under which he transferred to himself and Modie J. Spiegel as trustees, 625 shares of Spiegel's House Furnishing Company and 750 shares of Spiegel May Stern Company. (R 126.) Broad powers of management were reserved to the trustees. (See paragraph 1, R. 86, 126–127.)

The trust was to last for the settlor's life, and during that period the income was to be paid to his three children or their descendants. The income provisions were as follows (R. 86–87, 127):

> 2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Julia K. Spiegel—such income to be distributed at convenient intervals each year. In the event that any of

> my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

At the settlor's death, the corpus was to be paid over to his three children or their descendants, and if any child should have predeceased the settlor without leaving any descendants, his share was to go to the remaining children. The trust provisions in this respect were as follows (R. 87, 127–128):

> 3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her

> surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

The trust instrument also contained spendthrift provisions, as follows (R. 87):

> 6. None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

No part of the corpus held by the trustees at the grantor's death was included in the gross estate shown on the estate tax return filed by the executors of the grantor's estate. In recomputing the estate tax, the Commissioner included in the decedent's gross estate $1,140,606.30, the fair market value of the entire trust corpus and accumulated income held by the trustees on December 19, 1940, the date of decedent's death. (R. 128.)

The transfers of the property to the above trust on January 2, 1920, were not made in contemplation of death. (R. 128.)

On the basis of these facts, the Tax Court held that the value of the trust was not includible in decedent's gross estate under Section 811(c) of the Internal Revenue Code. This holding was based on the Tax Court's conclusion that, in creating the trust, the decedent had retained no "string or tie" amounting to a possibility of re-

version and that, therefore, the doctrine of *Helvering* v. *Hallock*, 309 U. S. 106, and decisions derived from it, are inapplicable. (R. 129.) The Circuit Court of Appeals reversed, holding that the decedent had a reversionary interest by operation of law (in the event that the beneficiaries should predecease him) which required the inclusion of the value of the trust property in his gross estate. (R. 151–158.)

SUMMARY OF ARGUMENT

I

This being an Illinois trust, it should be construed in accordance with Illinois law. So construing it, the Circuit Court of Appeals correctly held that if none of the beneficiaries had survived the settlor, and that was a possibility, the trust would have failed and there would have been a resulting trust in favor of the settlor. If there be any doubt about the Illinois law, then the doubt should be resolved against the taxpayers, who have the burden of showing by clear and convincing proof that the local law supports their contention that there was no possibility of reversion. Cf. *Helvering* v. *Leonard*, 310 U. S. 80, 86. Moreover, in the absence of a definite conviction of error, this Court has stated that it will ordinarily accept the judgment of the Circuit Court of Appeals with respect to the law of a State included in the circuit, and we submit there was no error

in the conclusion of the Circuit Court of Appeals here. Cf. *Helvering* v. *Stuart*, 317 U. S. 154, 163.

II

The instant transfer is taxable under Section 811 (c) of the Internal Revenue Code as one intended to take effect in possession or enjoyment at or after the grantor's death. All of the provisions for distribution of the corpus were made with reference to the grantor's death and the interests of the remaindermen were all conditioned on survivorship. And since the trust property would have reverted to the grantor if he had survived all the beneficiaries, it necessarily follows that the transfer is taxable. *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Helvering* v. *Hallock*, 309 U. S. 106. The basic reason why transfers of this type fall within the statute is that the rights of the beneficiaries are in fact dependent upon their surviving the grantor and that the grantor has retained a contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the ultimate takers. And it seems plain that where the settlor has so carved up the property that there is a possibility of reversion by operation of law the result is the same as if he had expressly reserved the identical reversionary interest. The Treasury regulations, which undertake to interpret the statute and the decisions of this Court, explicitly provide that section 811 (c) applies in situations

such as the instant case. These regulations are reasonable and should not be held invalid.

III

The rule in *Dobson* v. *Commissioner*, 320 U. S. 489, not only does not prevent the Circuit Court of Appeals from reviewing the Tax Court's decision in a case like this, but it affirmatively sanctions such review. The fundamental question is one of law, involving as it does the interpretation of a statutory provision, and it turns upon a generalizing principle with respect to the efficacy of a possibility of reverter by operation of law which has been specifically included in all of the Treasury Regulations issued since *Helvering* v. *Hallock*, 309 U. S. 106, was decided. Where the issue is the validity of a Treasury regulation of general scope, the *Dobson* case has no application. In circumstances such as these, there is no adequate basis for any contention that the Tax Court's decision must be accepted as final.

ARGUMENT

Preliminary analysis.—Had the decedent explicitly provided that the trust corpus would be restored to him in the event that all the beneficiaries should die during his own lifetime, then the trust corpus would clearly be includible in his gross estate under Sec. 811 (c). Such result would be plainly compelled by *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, which is different only in the im-

material respect that the grantor had to outlive two, instead of three, children and their descendants.

In the present case, the decedent has not explicitly provided that the corpus was to be returned to him in the event that he should outlive all his children and their descendants. He has made no provision whatever for the disposition of the corpus in the event of such contingency. It is the Government's position, however, that, under applicable Illinois law, the corpus would be restored to him in such circumstances, just as though he had explicitly provided therefor. And it is the Government's further contention that the operation of Section 811 (c) does not depend upon whether the settlor retains a reversionary interest by an explicit reservation, as in the *Fidelity Co.* case, or whether he achieves the *identical* result by merely failing to provide for the contingency of his surviving the beneficiaries. In both situations, the beneficiaries' rights in the corpus depend upon their surviving the settlor, and in both situations the settlor would reacquire the corpus in the event that he survived the beneficiaries. The very theory of *Helvering* v. *Hallock*, 309 U. S. 106, upon which the *Fidelity Co.* decision is based, would forbid drawing any distinction for tax purposes between situations involving *identical* property interests merely because they were created by different conveyancing devices. Moreover, the Treasury Regulations

(Regulations 105, Sec. 81.17, as amended by T. D. 5512) expressly provide for the inclusion of the corpus in the settlor's gross estate if the beneficiaries' rights depend upon their surviving the grantor, and if the decedent "possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer *or otherwise.*)" Indeed, these provisions in the regulations are followed by a number of examples, and "Example (7)" describes precisely the type of situation that is involved herein. See *infra,* pp. 31–32.

Accordingly, we shall contend, *first,* that the legal effect of the trust instrument under Illinois law is the same as though the settlor had explicitly reserved the right to reacquire the corpus in the event that he survived the beneficiaries; *second,* that such transfer in trust falls within Section 811 (c); and, *third,* that the adverse ruling of the Tax Court as to the scope of Section 811 (c) was open to review by the court below.

I

THERE WAS A POSSIBILITY OF REVERSION OF THE TRUST CORPUS UNDER ILLINOIS LAW

1. This being an Illinois trust, the parties are in agreement that it should be construed in accordance with Illinois law. *Blair* v. *Commissioner,* 300 U. S. 5, 9–10; *Freuler* v. *Helvering,* 291 U. S. 35, 45; *Helvering* v. *Stuart,* 317 U. S. 154, 162. So construing it, the Circuit Court of Appeals

held, correctly, we submit, that if none of the beneficiaries had survived the settlor, and that was a possibility, the trust would have failed and there would have been a resulting trust in favor of the settlor. This is in accordance with the general rule that where a trust fails for want of beneficiaries, the trust property will revert to the grantor or his estate by operation of law. See Restatement, Trusts (1935), Sec. 411; Bogert, Trusts and Trustees (1935), Vol. 2, Sec. 468; Scott, Trusts (1939), Vol. 3, Sec. 411, p. 2175; Perry, Trusts (1911), Vol. 1, Sec. 160, pp. 248–249; *Doctor* v. *Hughes,* 225 N. Y. 305, 309; *Newton* v. *Hunt,* 134 App. Div. 325, 334, affirmed, 201 N. Y. 599. There seems to be a paucity of authority on the exact point in Illinois (see Restatement, Trusts, Ill. Ann. (1941), Sec. 411), but such cases as have been found clearly indicate that the Illinois rule is no different from the ordinary one. *Lill* v. *Brant,* 6 Ill. App. 366, 376; *Corwin* v. *Rheims,* 390 Ill. 205, 223; *Harris Trust & Savings Bank* v. *Morse,* 238 Ill. App. 232, 250.

In support of the contention that there was no possibility of reversion in the instant case, the petitioners have relied heavily upon cases such as *Lachenmyer* v. *Gehlbach,* 266 Ill. 11, which holds that in determining whether beneficiaries under a will take a vested remainder upon the death of the testator, the question is to be considered in view of the settled rule that the

law favors the vesting of estates, and they are regarded as vested unless the contrary intention is shown (see p. 18). It seems unnecessary here to give detailed consideration to such cases for whatever may be their significance, it is clear that they are of little aid in construing an *inter vivos* trust. They are apparently based upon the rule that a testator is presumed not to have intended to die intestate as to any portion of his property (*Scofield* v. *Olcott,* 120 Ill. 362, 374;[1] *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 580; *Lewis* v. *Howe,* 174 N. Y. 340, 346–348), and that rule has no application to an *inter vivos* trust where the grantor can deal with the property as he sees fit in case it reverts to him. *Chater* v. *Carter,* 238 U. S. 572, 585.[2] If the grantor in the instant case had survived all the persons designated as beneficiaries in the trust agreement, he could have done as he pleased with the property and it would not necessarily have gone upon his death to his intestate estate. Cf. *Burton* v. *Boren,* 308 Ill. 440; *Doctor* v. *Hughes, supra.* As stated above, it is the general rule that where

[1] The court there said: "It has been said, that the idea of any one deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary dispositions as to justify almost any construction to avoid it. 2 Redfield on Wills, 235; 2 Jarman on Wills, (R. & T. ed.) 469."

[2] This Court said in regard to the trust in that case:

"In construing it, we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed."

a trust fails for want of beneficiaries the property will revert to the grantor by implication of law and this is also the rule in Illinois. *Lill* v. *Brant*, *supra*.

If any of the will cases are in point, then we submit that consideration should be given to the ones involving lapsed legacies. It is the general rule that where a legacy lapses by reason of the death of the legatee prior to that of the testator, the property falls into the residuum, or in the absence of a residuary clause, it is treated as intestate property. *Dorsey* v. *Dodson*, 203 Ill. 32, 37–38; *Belleville Bank* v. *Aneshaensel*, 298 Ill. 292, 303. The Circuit Court of Appeals below likened the instant situation to one where a legacy lapses and we submit that this is an apt analogy. A testator can make a new will when a legacy lapses, and here the situation is similar because the grantor could have done as he wished with the property if it had reverted to him. In neither case is it necessary to strain the construction of language in order to avoid intestacy as is done where the grantor is dead and can no longer direct the disposition of the property.

In any event, it will be remembered that these rules as to early vesting are merely rules of construction, not rigid rules of law, and they give way before circumstances pointing the other way. *Beach* v. *Busey*, 156 F. 2d 496, 498 (C. C. A. 6), certiorari denied, 329 U. S. 802; *Geiger* v. *Geer*,

395 Ill. 367; *Meldahl* v. *Wallace*, 270 Ill. 220; *Routt* v. *Newman*, 253 Ill. 185. Here, the facts indicate strongly that the decedent would not have wished the property to go to the estates of his children in preference to reverting to him had he survived all the persons named as beneficiaries in the trust instrument. The trust was to endure for the life of the grantor who named himself as one of the trustees with broad powers of control. The named beneficiaries were restricted to his children and their issue, and the trust was spendthrift in character. Cf. *Routt* v. *Newman, supra.* Moreover, the grantor was careful to provide that in the event of the death of any child without issue during the grantor's life, such child's share of the income and remainder was to be added to the shares of the surviving children. He made it quite plain that he did not wish to give any child the power to dispose of such child's share in the event that such child died without issue during the grantor's lifetime. In the circumstances, he could hardly have intended the corpus to pass, free from his own control, to his children's heirs or appointees, where all three of his children should die without issue during his lifetime. Plainly, the grantor intended his children to have defeasible interests only, and he intended them (or their descendants) to succeed to the corpus, only if they survived him. He certainly would not have wanted the property to vest indefeasibly during his lifetime in the heirs or appointees of his children who might not

have been his blood relatives. If the grantor's three children had died without any surviving issue during his lifetime, it is inconceivable that an Illinois court of equity would not have restored the corpus to him.

The cases of *Smith* v. *Dugger*, 310 Ill. 624, and *Harder* v. *Matthews*, 309 Ill. 548, cited by taxpayers (Br. 28) are not at variance with our position here. Neither involved transfers in trust; neither raised any issue as to a resulting trust; and even with respect to the issues there raised it was plainly recognized that the rule of construction relied upon "yields readily to any indication in the instrument" (*Harder* v. *Matthews*, 309 Ill. at p. 568) showing a different intention. Moreover, at least one of them (*Smith* v. *Dugger*, 310 Ill. at p. 625) involved a transfer for a cash consideration; and even in that situation the language of the court strongly indicates (p. 626) that if Frederick (one of the grantees) had died during the lifetime of his father (the grantor), and his brothers (co-grantees) had predeceased him, then Frederick's share would have reverted to the grantor. If anything, that case supports the conclusion of the court below that if the beneficiaries herein had died during the grantor's lifetime, there would have been a resulting trust in his favor.

2. Moreover, we submit that if there be doubt as to the Illinois law that doubt must be resolved here against the taxpayers. For, as this Court

has held, a taxpayer may not avoid the operation of a taxing provision by invoking local law, unless he establishes by "clear and convincing proof" that the local law supports his contention. *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 86. And this Court has held that in the absence of "a definite conviction of error", it will ordinarily accept the judgment of the Circuit Court of Appeals with respect to the law of a State embraced within the circuit. *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Co.*, 315 U. S. 280. We submit that the taxpayers have failed to discharge their burden of proof as to the Illinois law, and they have certainly failed to show that the judgment of the Circuit Court of Appeals was clearly and definitely erroneous.

In view of these considerations we submit that there plainly was a possibility under Illinois law that the entire trust corpus might have reverted to the instant grantor, and the reasoned judgment of the Circuit Court of Appeals to that effect was correct and should not here be disturbed.

II

THE TRANSFER IS TAXABLE UNDER SECTION 811 (c) OF THE INTERNAL REVENUE CODE

1. Passing now to the question of taxability, we submit that this case is controlled by *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; and *Goldstone* v.

United States, 325 U. S. 687. Those cases interpret *Helvering* v. *Hallock*, 309 U. S. 106, in such a way as to indicate clearly that transfers such as the instant one are taxable under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*), which applies to transfers intended to take effect in possession or enjoyment at or after the grantor's death.

In *Fidelity Co.* v. *Rothensies*, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, utilizing the principles set forth in *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, *supra*, held the full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111–112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability.

> The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property was includible in his gross estate under Section 302 (c). In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 116):

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It

> makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (e). In so holding the Court took the view that the wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determi-

nation of the ultimate possession or enjoyment of the property, the transfer was taxable.

It will be noted that in deciding the foregoing cases the Court did not undertake to draw any distinction between express reversions on the one hand and implied reversions on the other. Indeed, the language of the opinions indicates clearly that none should be made. Thus in *Fidelity Co.* v. *Rothensies, supra,* where there was an express reservation of a contingent power of appointment but no express provision with respect to the possibility of the decedent's surviving her daughters and their descendants, the Court treated as relevant the consequences that would flow in that case from such survival. This demonstrates, we submit, that for the practical purposes of the estate tax a possibility of reversion by implication of law is just as effective as one expressly retained. The very theory upon which the *Hallock* case was decided would forbid drawing any distinction between a reversionary interest expressly reserved and an identical interest that comes to the grantor by operation of law; for, it could hardly matter whether the grantor provides for his reversionary interest by the conveyancing device of expressly reserving it, or whether he achieves the identical result by the conveyancing device of merely remaining silent as to what would happen to the corpus in the event that he should survive the beneficiaries.

2. All of the Treasury Regulations promulgated

since the *Hallock* case was decided (1940) are in harmony with this view. Thus, shortly after the *Hallock* decision, Article 17, Treasury Regulations 80 (1937 ed.), was amended by T. D. 5008, 1940-2 Cum. Bull. 286, so as to make clear that property is includible in the donor's gross estate if it is to revert to the donor in the event that he should "survive the donee or another person, or the reverting of the property is conditioned upon some other contingency terminable by his death." Moreover, "* * * it is unimportant whether his interest be denominated a reversion or a possibility of reverter, *whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested,* and the tax will apply, * * * without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916." [Italics supplied.]

Substantially identical provisions were included in Section 81.17 of Treasury Regulations 105 (promulgated in 1942). Thereafter, these regulations were clarified still further in 1946, as shown in the Appendix, *infra,* pp. 30–32. As they now stand, the regulations set forth the general principles involved in cases of this type, and then undertake to give a number of examples. Thus, in the statement of general principles, the regulations require merely that the transfer be such that "(1) possession or enjoyment of the trans-

ferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)". And Example (7) which gives a concrete illustration of these principles is as follows:

> *Example* (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

The instant case presents an identical situation. These regulations are reasonable and should not be held invalid.

3. In the instant case the Circuit Court of Appeals correctly held that the possibility that the property might revert to the settlor by operation of law was enough to support the tax. Four other Circuit Courts of Appeals have reached the same conclusion. See *Commissioner* v. *Bank of California*, 155 F. 2d 1 (C. C. A. 9), certiorari denied, 329 U. S. 725; *Commissioner* v. *Bayne's*

Estate, 155 F. 2d 475 (C. C. A. 2); *Beach* v. *Busey*, 156 F. 2d 496 (C. C. A. 6), certiorari denied, 329 U. S. 802; *Thomas* v. *Graham*, 158 F. 2d 561 (C. C. A. 5).[3]

The taxpayer relies (Br. 40) upon *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565 (C. Cls.), which is of doubtful authority in the Court of Claims itself, in the light of its later decision in *Pennsylvania Co.* v. *United States*, 62 F. Supp. 697, where it recognized the efficacy of a possibility of reversion by operation of law.

The decisions in the Tax Court in cases of this kind are contradictory and confusing. In *Estate of Leaman* v. *Commissioner*, 5 T. C. 699, the Tax Court held in circumstances quite similar to those in the instant case that there was a taxable transfer; but in later decisions (*Estate of Hughes* v. *Commissioner*, 7 T. C. 1348, on appeal (C. C. A. 2), and *Estate of Friedman* v. *Commissioner*,

[3] A contrary result was reached by the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Estate of Church*, now pending before this Court, No. 96, present Term. However, the Third Circuit did not decide the issue on the merits; it merely held that it was precluded from reviewing the decision below on the authority of *Dobson* v. *Commissioner*, 320 U. S. 489. It is true that the Third Circuit took the view some years ago in *Commissioner* v. *Kellogg*, 119 F. 2d 54, that a possiblity of reversion by operation of law is not so significant as one expressly retained, but in later decisions (*United States* v. *Tonkin*, 150 F. 2d 531, 534, certiorari denied, 326 U. S. 771; *Eldredge* v. *Rothensies*, 150 F. 2d 23, 24, certiorari denied, 326 U. S. 772), it appears to have renounced that view.

8 T. C. 68, on appeal (C. C. A. 3)), the Tax Court reached the opposite result, holding the transfers nontaxable and refusing to follow the decision of the Second Circuit in the *Bayne* case, *supra*, where, as above noted, such a transfer was held to be taxable. However, in a recent decision (*Estate of Bradley* v. *Commissioner*, 9 T. C. No. 20), the Tax Court appears to have changed its views again and sustained the tax where the decedent had an interest in the income and there was a remote possibility of reversion by operation of law.

As noted above, the basic reason why transfers of this type fall within the statute is that the grantor has retained a "contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries." *Fidelity Co.* v. *Rothensies, supra,* p. 112. And it seems plain that a possibility of reversion by operation of law is just as effective as one expressly retained to accomplish or contribute to such a result. See I Paul, Federal Estate and Gift Taxation (1942), Section 7.23, p. 368; also 1946 Supplement, Section 7.23, pp. 196–197.

The taxpayers rely strongly upon *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. That case was decided in 1929, prior to the decision in the *Hallock* case where the importance of a reversionary interest in a trust was finally established. It does not appear from the Court's opinion in the

Northern Trust Co. case that there was a possibility of reversion to the settlor, but even assuming that there was, nevertheless the point as to its effect was not raised or considered and the decision there is thought to stand merely for the proposition that where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion, the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death. Indeed, the necessity for so viewing the *Northern Trust Co.* decision is clearly shown by the reasoning of the Court (see pp. 348–349) that it was doubtful whether the statute was intended to reach such transfers and further doubtful that if construed so as to reach them the statute would be constitutional. Those doubts have now been swept away by *Helvering* v. *Hallock* (see also *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94, 97–98), at least where there is a reversionary interest, and the statute has been construed in the *Hallock, Fidelity Co., Field* and *Goldstone* cases so as to make it abundantly plain that the statute operates whenever the provisions for distribution of the trust property are made dependent upon the grantor's death and he has retained some contingent interest, however re-

mote, in the trust property. The instant case is clearly within the scope of the later decisions, and taxability is not foreclosed by *Reinecke* v. *Northern Trust Co.* Had the grantor explicitly reserved the interest involved, it could not seriously be argued that the *Fidelity Co.* case is inapplicable. Accordingly, this case reduces itself to the narrow question whether a different rule should apply where the grantor achieves the identical result through a different conveyancing device. And the view that such a distinction is immaterial has been adopted in framing the Treasury regulation which is intended to serve as a comprehensive guide to the statute and is based upon the decisions of this Court in the *Hallock* case and later cases which follow it.

III

THE CIRCUIT COURT OF APPEALS HAD POWER TO REVERSE THE DECISION OF THE TAX COURT

The third question presented by the petition for certiorari is whether the Circuit Court of Appeals had power under *Dobson* v. *Commissioner, supra,* to review and reverse the decision of the Tax Court that the transfer was not taxable. The court held that it did and we believe the holding to be correct. It is in accord with the decisions of the Ninth and Second Circuits (*Commissioner* v. *Bank of California, supra; Commissioner* v. *Bayne's Estate, supra*) but in conflict with the Third Circuit's decision in *Com-*

missioner v. *Estate of Church, supra.* The Third Circuit there took the view that the question as to taxability under Section 811 (c) is essentially one of fact and the Tax Court's determination must be accepted as final under the *Dobson* rule. We submit that the *Church* case is patently unsound.

Transfers such as these, where the distribution of the corpus must await the grantor's death, are necessarily intended to take effect in possession or enjoyment at or after such death as a matter of fact. And indeed this was recognized in *Reinecke* v. *Northern Trust Co., supra,* p. 347. The only question at issue is whether they were so intended as a matter of law. That question is one of statutory interpretation and therefore one of pure law. Moreover, it turns upon a generalizing principle with respect to the efficacy of a possibility of reversion by operation of law which has been specifically included in the regulations ever since they were amended in 1940 to conform with what was considered to be the effect of the decision of this Court in the *Hallock* case. Therefore the instant case and the *Church* case involve (1) the meaning of the statute, (2) a generalizing principle and (3) the validity of the regulations.

Here the question is not merely whether the facts fit the pattern of the statute, but also what that pattern is and whether the regulations con-

form to it. That is a question for the appellate courts, and it is our understanding that in circumstances such as these the *Dobson* rule not only does not preclude review but affirms the right thereto. *Dobson* v. *Commissioner, supra,* pp. 492–493, 502; *John Kelley Co.* v. *Commissioner,* 326 U. S. 521, 529; *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 370–371; *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 292; *Commissioner* v. *Estate of Holmes,* 326 U. S. 480; *Crane* v. *Commissioner,* 331 U. S. 1; *McWilliams* v. *Commissioner,* Nos. 945, 946 and 947, 1946 Term, decided June 16, 1947.

Attention is called to the fact that in the *Holmes* case, which was an estate tax case involving a question as to Section 811 (d) of the Internal Revenue Code, this Court reversed both the Circuit Court of Appeals and the Tax Court. And indeed, in the *Hallock* case itself the Court reversed both the Circuit Court of Appeals and the Tax Court.

In the circumstances it is submitted that there is little doubt that the Circuit Court of Appeals for the Seventh Circuit was correct in holding that it had power to reverse the decision of the Tax Court in the instant case, and the Circuit Court of Appeals for the Third Circuit was wrong in holding that the Tax Court's decision in the *Church* case should be treated as final.

CONCLUSION

The judgment of the Circuit Court of Appeals was correct and should therefore be affirmed.

Respectfully submitted.

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OCTOBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In

this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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Nos. 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1948

ESTATE OF SIDNEY M. SCHEUER, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED,
EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 5

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

BRIEF FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

QUESTIONS ASKED BY THE COURT

These two cases were argued together and submitted to this Court on October 24, 1947. On

June 21, 1948, the cases were ordered restored to the docket and were assigned for reargument. Counsel were requested to discuss particularly the following questions in so far as they are relevant to the respective cases:

1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos,* did Section 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate tax purposes? That is, did Section 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos,* merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did Section 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate tax purposes?

3. Did Section 811 (c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust

because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

4. Were the joint congressional resolution of 1931 (46 Stat. 1516–1517), and subsequent related estate tax statutes, intended to be a repudiation of this Court's *May* v. *Heiner* (281 U. S. 238) interpretation of the estate-tax statutes?

5. Did the *May* v. *Heiner* estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in *Helvering* v. *Hallock* (309 U. S. 106)?

6. Under Section 811 (c) is the "possession or enjoyment" of the corpus of an *inter vivos* trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

7. In the light of this Court's opinion in *Helvering* v. *Hallock* does the *Hassett* v. *Welch* (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

8. Assuming that under the "refined technicalities of the law of property" the "possession or enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See *Helvering* v. *Hallock*, p. 112.)

9. What is the effect of the rulings of *Helvering* v. *Clifford* (309 U. S. 331) upon these trusts?

ARGUMENT

The questions asked by the Court indicate a rather fundamental inquiry into the operation of the estate tax statute generally. The inquiry is precipitated, we believe, by the existence of certain basic decisions which are not wholly consistent with one another, and which render it difficult to reconcile some of the results with the underlying purpose and language of the statute. We had not originally intended to raise such fundamental issues, since we believe that our position is supported upon narrower grounds, namely, that the present cases are explicitly covered by the provisions of a valid treasury regulation which undertakes to accommodate itself to the various decisions of this Court. (See our main brief in *Spiegel* case, pp. 20–22.) However, in view of the nature of the questions now put by the Court, we feel that a more fundamental analysis is appropriate, and since the answers to

a number of the questions have their roots in the same underlying materials, we think it will be helpful first to examine certain basic considerations.

The first federal estate tax law was enacted as part of the Revenue Act of 1916 (c. 463, 39 Stat. 756, Secs. 200–212). It undertook to tax as part of the decedent's estate not only property owned by the decedent at the time of his death, but also certain *inter vivos* transfers that were intended as substitutes for testamentary dispositions. Included among the latter were transfers made "in contemplation of" death, as well as transfers "intended to take effect in possession or enjoyment at or after" death. Section 202 (b), Revenue Act of 1916. These provisions were carried forward in the various reenactments of the estate tax law,[1] and the language quoted appears in Section 811 (c) of the Internal Revenue Code, involved herein.

The clause "intended to take effect in possession or enjoyment * * *" was not a novel one. It had appeared in substantially identical form in the death tax statutes of at least forty

[1] Section 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 402 (c) of the Revenue Act of 1921, c. 136, 42 Stat. 278; Section 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9. The last basic estate tax statute was enacted in the Revenue Act of 1926, and, as amended, it was incorporated in the Internal Revenue Code.

States over a period of nearly a century, as well as in the early federal death tax legislation enacted during the Civil War and the Spanish American War.[2] The language used was non-technical, and was obviously not intended to deal with the "vesting" of rights or title. The statute plainly contemplated transactions in which the actual possession or enjoyment of the property in the hands of the donee was to be postponed at least until the donor's death, irrespective of when the donee's rights became established. It was not particularly significant whether the donee's rights vested *in interest* at once; what was significant was whether the transfer was to take effect *in possession or enjoyment* at or after the donor's death.

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[2] The history of this clause is traced in the Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, p. 20 *et seq.* The first death tax statute passed by a state in this country, the Pennsylvania Act of April 7, 1826 (Laws 1826, c. 72, Sec. 1) dealt with property "* * * transferred by deed, grant, bargain or sale, made or *intended to take effect, in possession or enjoyment after the death of the grantor* or bargainor * * *." [Italics supplied.] The clause thereafter appeared in the early federal death tax legislation (Section 111 of the Act of July 1, 1862, c. 119, 12 Stat. 432, 485; Section 124 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 285; Section 29 of the Act of June 13, 1898, c. 448, 30 Stat. 448, 464), as well as in the death tax statutes of thirty-nine other States prior to the adoption of the first Federal estate tax law in 1916. See also note, *Origin of the Phrase "Intended to Take Effect in Possession or Enjoyment at or After ... Death" (Section 811 (c), Internal Revenue Code)*, 56 Yale L. J. 176.

Such was the clear understanding of that provision, as disclosed by decisions of the courts prior to the adoption of the first federal estate tax statute in 1916,[3] as well as by the regulations promulgated thereafter by the Secretary of the Treasury. For example, Article 24 of Regulations 37 (1919 and 1921 eds.), after providing that a transfer is taxable merely because the grantor reserves the income to himself for life, made it plain that the transfer might also be taxable even though the decedent had reserved no interest whatever to himself; the regulations specifically stated:

> A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

Similar provisions appeared also in Article 20, Regulations 63 (1922 ed.); Article 18, Regulations 68 (1924 ed.); Article 18, Regulations 70 (1926

[3] For a collection of cases in the state courts, see Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, p. 20, *et seq.* The "possession or enjoyment" clause in the federal act of 1898 was involved in *Vanderbilt* v. *Eidman*, 196 U. S. 480, where the Court pointed out (p. 493) that Congress made "the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof" in the transferee.

and 1929 eds.). And only several years ago, this Court pointed out in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, 486:

> More than once recently we have emphasized that "enjoyment" and "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. Cf. *United States* v. *Pelzer,* 312 U. S. 399, 403; *Fondren* v. *Commissioner,* 324 U. S. 18, 20; *Commissioner* v. *Disston,* 325 U. S. 442.

Thus, if the plain language of the statute were to be given effect, it would include all transfers in which the actual possession or enjoyment of the property by the donees could not take effect until at or after the donor's death, regardless of whether the donor reserved any interest to himself, and regardless of whether the donees' rights vested in interest at once. Moreover, such a literal reading of the statute would be fully in keeping with its purpose, namely, to reach *inter vivos* transfers that were substitutes for testamentary dispositions. The companion clause dealing with transfers "in contemplation of death" has never been understood to impose the requirement either that the decedent retain an interest in the transferred property or that the transferees' rights be defeasible prior to the decedent's death. Both types of transfers were

properly regarded by Congress as substitutes for testamentary dispositions; and both were therefore included in the measure of the gross estate. See *United States* v. *Wells*, 283 U. S. 102, 116–117.

From the date of the enactment of the Revenue Act of 1916 until the present day, the "intended to take effect in possession or enjoyment" clause has been coupled in the same subsection with the "contemplation of death" clause. As a matter of syntax, both modify "transfer". Both clauses have a unity of purpose, namely, to reach substitutes for testamentary dispositions.[3a] If the transfer be motivated by the thought of death, it is treated as a substitute for a testamentary disposition, and it is included in the measure of the gross estate though the time of the decedent's death has no relation to the actual receipt of the property by the transferee. Since Congress, in the contemplation of death provision, was not concerned with the passing of property from the decedent at the date of his death, it may readily

[3a] In *United States* v. *Wells*, 283 U. S. 102, 116–117, Mr. Chief Justice Hughes declared:

"The statutory description embraces gifts *inter vivos*, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."

be concluded that Congress was likewise not concerned with the passing of property from the decedent at the date of his death when it grouped within the same category transfers "intended to take effect in possession or enjoyment" at or after the decedent's death. The category is one of substitutes for testamentary dispositions. A transfer in contemplation of death is treated as a substitute for a testamentary disposition because the thought of death motivates the transfer. A transfer intended to take effect in possession or enjoyment in the transferee at or after the decedent's death is treated as a substitute for a testamentary disposition by reason of the nature of the transfer. Thus a gift from a father to his son of a bank account, thereafter possessed and enjoyed by the son during the father's lifetime, may be classed as a transfer in contemplation of death but search must be made for the father's motive in making the transfer. How much clearer a case for a substitute for a testamentary disposition, however, is presented where the father transfers a bank book to a third party to be delivered to the son upon the father's death. Search for the father's motive in such a case would be needless. The very nature of such a transfer renders it a substitute for a testamentary disposition, and it should therefore be classified as a transfer "intended to take effect in posses-

sion or enjoyment at or after" death, without any inquiry into whether the decedent retained something which "passed" at his death.[4]

However, the efforts of the Treasury Department to give the "possession or enjoyment" clause its proper scope met with failure in this Court in several important early cases involving this clause in the federal estate tax statute. In *Shukert* v. *Allen*, 273 U. S. 545, the decedent, at fifty-six years of age, had transferred securities in trust to accumulate the income for thirty years, and at the end of that period to divide the principal and accumulated income among his three named children; he died shortly thereafter. Here was a case in which the transfer was plainly intended to take effect in possession or enjoyment

[4] Further confirmation of the congressional purpose not to confine the statute to "transfers" from the decedent at his death is found in the provisions requiring the inclusion of interests held jointly by the decedent and any other person. Though the right of the other joint tenant may have vested at the time of the creation of the tenancy, and though such tenant could sever the tenancy at any time and receive at least one-half of the property prior to the other's death, it has been established that all of the property is to be included in the decedent's gross estate. *United States* v. *Jacobs*, 306 U. S. 363. Cf. *Tyler* v. *United States*, 281 U. S. 497; *Fernandez* v. *Wiener*, 326 U. S. 340. Although it may fairly be said that at least one-half of such property does not pass at the decedent's death, all of it is nevertheless included in the measure of the gross estate since the arrangement has been treated by Congress as a substitute for a testamentary disposition.

at or after the grantor's death.* Yet this Court reversed both lower courts and ruled that the transfer was not within the statute, calling attention to the fact that the transfer was immediate "leaving no interest remaining in the testator" (p. 547) and that "the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them * * * if he died before the termination of the trust" (p. 547).

Again, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, it was held that property transferred in trust was not covered by the "possession or enjoyment" clause, where the life interest was terminable five years after the death of the settlor or on the death of the life beneficiary should she survive that date, with a remainder over. Here, too, it was plain that actual possession or enjoyment of the property was postponed until after the settlor's death; yet the Court held that since the settlor had "parted both with the possession and his entire beneficial interest in the property when the trust was created" (p. 347), the transfer was not taxable. The statute as construed by the Government had been attacked on

*In ruling in favor of the Government, the District Court had concluded that the donor had postponed enjoyment beyond any time that he expected to live himself. *Shukert* v. *Allen*, 300 Fed. 754, 756 (D. Nebraska), affirmed, 6 F. 2d 551 (C. C. A. 8).

constitutional grounds by the taxpayer, and it seems probable that constitutional doubts played some part in the Court's conclusion not to apply the statute in accordance with its literal meaning (cf. pp. 348–349), doubts which today appear to be wholly without substance. Cf. *Fernandez* v. *Wiener*, 326 U. S. 340, 355; *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94, 97–98; *Helvering* v *Hallock*, 309 U. S. 106; *Helvering* v. *Bullard*, 303 U. S. 297; *Helvering* v. *City Bank Co.*, 296 U. S. 85.

Not long thereafter, in *May* v. *Heiner*, 281 U. S. 238, the Court held that a transfer was not within the statute where the income was to be paid to the grantor's husband during his life and after his death to the grantor, with remainders to their children upon termination of the life estates. The opinion stressed the fact that at the grantor's death "no interest in the property * * * passed from her to the living; title thereto had been definitely fixed by the trust deed" (p. 243). And within less than a year, it was held in three cases, decided in identical *per curiam* opinions upon the authority of *May* v. *Heiner*, that a transfer accompanied by the retention of a life estate was not comprehended within the meaning of the "possession or enjoyment" clause. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784. The cases were decided on March

2, 1931, and within one day a joint resolution was introduced and passed by both houses of Congress (c. 454, 46 Stat. 1516) to overcome the effect of those decisions. In discussing the matter, Senator Smoot, Chairman of the Finance Committee, declared (Cong. Rec., Vol. 74, Part 7, p. 7078):

> The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision.

He voiced the common understanding that prior to these decisions the statute had generally been regarded as covering such transfers, and stated (ibid.):

> The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide.

It is true that since the immediate purpose of the joint resolution was to overcome the effect of these decisions, it dealt merely with transfers in which the decedent had retained some life interest. Yet, in rejecting those decisions, it seems persuasive that Congress was disapproving the general approach to the problem, and that it did not regard the "possession or enjoyment" clause as inoperative merely because the survivors' rights had become indefeasibly established at the time of the transfer.

However, the Court continued to impose the general requirement that the decedent must retain

rights which pass at his death to the survivors. And in *Klein* v. *United States*, 283 U. S. 231, it was held that the grantor's right to reacquire full dominion over the property in the event he should outlive the life tenant was sufficient to bring the transfer within the clause. Thereupon, litigation arose as to whether the grantor had retained a sufficient interest where his right to reacquire the property, although substantially equivalent to the right in the *Klein* case, was classifiable under technical property law as a "contingent" interest or a "possibility of reverter". And the holding that such a contingent interest was not sufficient (*Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48) was subsequently overruled in *Helvering* v. *Hallock*, 309 U. S. 106. Moreover, the Court later made it clear that the rule of the *Hallock* case applied even where the decedent's retained interest was "remote". *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, 111–112; *Commissioner* v. *Estate of Field*, 324 U. S. 113, 116; *Goldstone* v. *United States*, 325 U. S. 687. But, at no time has the Court expressly overruled such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, which require that the decedent retain some interest in the property.

Accordingly, although believing that such cases were wrongly decided in this respect, the Treasury has nevertheless conscientiously endeavored

to accommodate its practice to all of the decisions. Although it was felt that a transfer in which the donees' actual possession or enjoyment could not take effect prior to the decedent's death was covered by the statute, the Treasury nevertheless has adopted regulations in which (see Appendix, *infra*, p. 64) it is provided:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—
>
> (1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise). [Regulations 105]

The second condition is not required by the language of the statute, and was inserted merely because such cases as *Reinecke* v. *Northern Trust Co.* have not been explicitly overruled. But assuming that the second condition must be met,

the regulations make it clear that the statute applies whether the retained interest arises "by the express terms of the instrument of transfer *or otherwise*" [italics supplied], and among the numerous examples given in the regulations, Example (7) covers the instant cases precisely:

> *Example* (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

At the time the present cases were first submitted to the Court on brief and oral argument last term, it was assumed by the Government that both conditions had to be met, and the Government contended that the decedent's right, under state law, to reacquire the property in the event that he should outlive the beneficiaries was sufficient to fulfill the second condition. We now renew that contention, and suggest that a decision along this line would dispose of the litigation upon narrow grounds without inquiry into

the troublesome question whether the *Northern Trust Co.* case or *May* v. *Heiner* should be expressly overruled. However, if the Court is inclined to examine the problem along more fundamental lines, we think that the transfers should be held taxable regardless of whether the decedents retained any interest. In both cases, none of the beneficiaries could come into possession or enjoyment of the corpora of the trusts until at or after the death of the respective grantor. Indeed, even the rights (as distinguished from possession or enjoyment) of those beneficiaries in the property did not become indefeasibly vested until at or after the decedent's death, for their rights were in fact contingent upon surviving the decedent. In every real sense, these transfers were therefore intended to take effect in possession or enjoyment at or after the grantor's death.

Question 1

Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, inter vivos, did Section 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate tax purposes? That is, did Section 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust,

created inter vivos, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

If the plain language of Section 811 (c) is to be given effect, and if the purpose of the provision (to reach substitutes for testamentary dispositions) is not to be frustrated, the answer to Question 1 is "Yes." In both the *Spiegel* and *Church* cases, the grantor had so tied up his property during his life time that no beneficiary could obtain possession or enjoyment of the corpus until at or after the grantor's death. Indeed, even the *interests* of the beneficiaries in the corpus could not become indefeasibly vested until at or after the grantor's death, for no one could take who did not survive the grantor. The decedent made his own death the indispensable event upon which the actual possession and enjoyment as well as the rights of the ultimate takers depended. In every real sense the grantor had utilized the trust device as a substitute for a testamentary disposition. Literally, the transfer in each case was intended "to take effect in possession or enjoyment at or after" the grantor's death; and it was the purpose of the statute to reach such transfers, regardless of whether the grantor had retained any interest for himself. Such was the understanding of the clause when the first federal estate law was enacted in 1916, as reflected in treasury regu-

lations that were in effect until 1930,[6] during several reenactments of the statute.[7]

On the other hand, if *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, is to be followed, the answer to Question 1 is "No". As shown by the discussion above, pp. 5–18, we think that case was erroneously decided in this respect, and is inconsistent in principle with such decisions as *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; and *Goldstone* v. *United States*, 325 U. S. 687. However, since the *Northern Trust Co.* case has never been expressly overruled, the Treasury has attempted to harmonize its practice to take that decision into account. And its present regulations spell out the double requirement: (1) that possession or enjoyment can be obtained only by beneficiaries who must survive the decedent; and (2) that the decedent or his estate have some right or interest in the transferred property (whether expressly retained or otherwise). Since we think that the tax was correctly imposed in each case under the regulation (which accepts the *Northern Trust Co.* decision), it is not absolutely necessary to consider whether the *Northern Trust Co.* case was correctly decided. Nevertheless, the acceptance of

[6] The pertinent provisions of the regulations (*supra*, p. 7), were eliminated in 1930 by T. D. 4285, IX–1 Cum. Bull. 356, presumably in response to the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929).

[7] See footnote 1, *supra*, p. 5.

the *Northern Trust Co.* case, on the one hand, and the *Hallock* and *Fidelity Co.* cases, on the other hand, as constituting a consistent body of law leads to making liability turn upon rather fine considerations. Accordingly, if the Court were disposed to state that the *Northern Trust* case be expressly overruled, there would result a more consistent pattern among the decisions, in consonance with the language and purpose of the statute.[8]

In addition to what has been said above regarding the incompatibility of the *Northern Trust* case with more recent decisions of this Court, the following may be pertinent. There has been much controversy as to whether *Helvering* v. *Hallock*, 309 U. S. 106, overruled *Reinecke* v. *Northern Trust Co.* or *May* v. *Heiner*. The Board of Tax Appeals held in 1941 in *Estate of Hughes* v. *Commissioner*, 44 B. T. A. 1196, that the effect of the *Hallock* case was to overrule *May* v. *Heiner*.[9] However, in *Estate of Bradley* v. *Com-*

[8] It should be noted that the express disapproval of the *Northern Trust* would not operate unfairly to the taxpayers in these cases, since the trusts were created in 1920 (Spiegel, R. 126) and 1924 (Church, R. 7), respectively, when there were outstanding regulations making it clear that a retained interest was not indispensable to taxability, (see p. 7, *supra*).

[9] See *Estate of Madison*, 26 Cal. 2d 453, 458–461, 159 P. 2d 630, for a thoughtful analysis of the trend of the decisions in this Court on this question. See also *In re Patterson's Estate*, 127 N. Y. S. 284, affirmed, 146 App. Div. 286, 130 N. Y. S. 970, affirmed, 204 N. Y. 677, 98 N. E. 1109; *Blodgett* v. *Union & New Haven Trust Co.*, 97 Conn. 405, 116 Atl. 908.

missioner, 1 T. C. 518, affirmed *sub nom. Helvering* v. *Proctor*, 140 F. 2d 87 (C. C. A. 2), the Tax Court receded from that view. Certainly, the *Hallock* case did not explicitly overrule either *Reinecke* v. *Northern Trust Co.* or *May* v. *Heiner*. But we do think that it is extremely difficult to reconcile either the approach or the results in these cases with the decision in the *Hallock* case.

The decision in *May* v. *Heiner* was based largely upon *Reinecke* v. *Northern Trust Co.*, from which it quoted at length, and concluded (281 U. S. at 243):

> At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; *title* thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event. [Italics supplied.]

The decisions of this Court in the *St. Louis Trust Co.* cases were likewise based upon the reasoning in the *Northern Trust* case. After quoting from the opinion in the *Northern Trust* case, the Court in *Helvering* v. *St. Louis Trust Co.*, stated (296 U. S. at 43):

> If, therefore, no interest in the property involved in a given case pass "from the possession, enjoyment or control of the donor at his death," there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his

death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility.

It would thus seem clear that *Reinecke* v. *Northern Trust Co.*, *May* v. *Heiner* and the *St. Louis Trust Company* cases were all placed on a common ground, namely, that where title has been definitely fixed by the *inter vivos* instrument, where no interest passes to the living from the decedent at his death but death merely "obliterates" any interest theretofore possessed by the decedent, the *inter vivos* transfer does not come within the scope of the "intended to take effect in possession or enjoyment" provision. From these cases developed the thought that the decedent or his estate must possess some right or interest in the property at the time of his death

as a condition to the operation of the statute upon *inter vivos* transfers.

In expressly overruling the *St. Louis Trust Company* cases, this Court in *Helvering* v. *Hallock* not only struck down the decisions as they pertained to the particular facts in the *St. Louis Trust Company* cases but at the same time, we think, rejected as unsound the basis on which the *St. Louis Trust Company* cases were rested. That basis being fundamentally the same as the basis of *Reinecke* v. *Northern Trust Co.* and *May* v. *Heiner*, it might well be concluded that the latter cases should fall with the *St. Louis Trust Company* cases.

In *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; and *Goldstone* v. *United States*, 325 U. S. 687, the decedents likewise possessed until their deaths possibilities of regaining the property or rights in the property, but such possibilities were "remote". In the *Fidelity* case this Court stated that the taxable gross estate must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter, and made it clear that the remoteness of the decedent's interest or its actuarial value make no difference in the determination of the taxable character of the transfer.

The retention by the settlor of a reversionary interest is, however, only one method of holding

in suspense until the moment of the settlor's death the ultimate possession or enjoyment of property. It is not the only method. If the death of the decedent is the event which determines not only the time when the ultimate taker will enter into actual possession or enjoyment but also determines who that taker will be, the ultimate possession or enjoyment of the property has been suspended until the decedent's death whether or not the decedent possessed a possibility of regaining the property during his lifetime. In the *Spiegel* case, even if it be assumed that the decedent possessed no possibility of reverter and no interest of any other kind under the transfer in trust, nevertheless his death was the intended event which would determine (1) the time when the actual possession and enjoyment of the remainder interest would take effect and (2) who the ultimate takers would be. In the *Church* case, the decedent retained during his lifetime the income from the property, that is, the actual possession and enjoyment of the property, and hence the actual possession and enjoyment of the property could not possibly take effect in the remainderman until his death; in addition since survivorship of the decedent was necessary for any remainderman to take, the decedent's death was the event which determined both the time of actual possession and enjoyment and also who the ultimate takers would be. A rule which makes the test of taxability turn upon the retention by

the decedent until his death of some interest in the property; which makes the quantum (however insignificant) of that retained interest an immaterial consideration; and which at the same time excludes from the reach of the tax other transfers in which the interests of the ultimate takers are of precisely the same character would seem to be an illogical rule.

In these circumstances, although the regulations undertake to reconcile all of the decisions on the basis of the reverter principle, we think that *Reinecke* v. *Northern Trust Co.* and *May* v. *Heiner* are fundamentally inconsistent with later decisions of this Court, and should be expressly repudiated if the Court should reach this basic issue.

Question 2

Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did Section 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate tax purposes?

The answer to this question is "Yes". A possibility of reversion in favor of the grantor's estate is just as effective to support the tax as one arising in favor of the grantor individually (cf. *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Chase Nat. Bank* v. *United States*, 116 F. 2d 625 (C. C. A. 2); *Schultz* v. *United States*, 140 F. 2d

945 (C. C. A. 8)), and the revised regulation specifically so provides in Requirement 2, *supra*, p. 16. The reason for this is clear: if, as in the present cases, possession or enjoyment of the remainder interests can be obtained only by beneficiaries who must survive the decedent and if there is a possibility that the property may fall into the grantor's estate, the transfer is just as much a substitute for a testamentary disposition as where there is a possibility that it may revert to the decedent during his lifetime. However, it should not be assumed that the reverter [10] in either of the present cases would operate merely in favor of settlor's estate. For, if our position is correct, there would be a reverter to the settlor himself in each case if all the beneficiaries should predecease him.

Moreover, no distinction should be drawn between a reverter that is expressly reserved and one that arises under applicable state law by reason of the settlor's omission to provide for the disposition of the property in the event that the beneficiaries fail to qualify. The quantum of the settlor's retained rights is identical, whether he reserves the reverter or whether he permits it to arise by operation of state law. The important

[10] Although it is questionable whether the term "reverter" accurately describes the settlor's reversionary interest (see *Helvering* v. *Hallock*, 309 U. S. at 118, fn. 6), we shall adopt that terminology in view of its common usage in this connection.

consideration is not whether he intended to reserve a reverter; it is rather whether he intended the transfer to take effect in possession or enjoyment at or after his death. And where he has made his death the indispensable event upon which the possession or enjoyment of the beneficiaries depends, he has already shown the necessary intent that the transfer take effect in possession or enjoyment at or after his death; the presence of a reverter is merely to meet the requirement of the *Northern Trust* case that decedent retain an interest—we know of no requirement anywhere that the decedent must *intend* to retain such interest.[11]

Nor should any distinction be drawn on the basis of the remoteness of the grantor's reversionary interest. This has been authoritatively settled in *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 111–112, which is comparable in this respect to the present cases. See also *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116.

[11] We do not mean to suggest that a grantor could not intend to retain a reverter merely by remaining silent as to what should happen to the property in the event that he outlives the beneficiaries. Indeed, undoubtedly one of the basic considerations with respect to resulting trusts and reverters by operation of law is the notion either that such was the grantor's unexpressed intention or that such would have been his intention had he thought about the matter. And we pointed out in our main brief in the *Spiegel* case (pp. 14–15) that such an intent could properly and must necessarily be imputed to the decedent in the light of the facts there presented. This is also true in the *Church* case.

Question 3

Did Section 811 (c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

If *Hassett* v. *Welch*, 303 U. S. 303, is to be regarded as correct, the answer to this question is "No."[12] In developing the reasons for this answer, we shall first examine the decision in *Hassett* v. *Welch*, and secondly, we shall then consider whether a different result should be reached under Section 811 (c) of the Internal Revenue Code, adopted in 1939.

(a) *Hassett* v. *Welch* involved a trust executed in 1924 with a life estate reserved in the grantor, who died on November 20, 1932. The Commissioner sought to include the transfer in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931 (c. 454, 46 Stat. 1516) and Section 803 (a) of the Revenue Act of 1932 (c. 209, 47

[12] Of course, this answer is on the assumption that *May* v. *Heiner* is otherwise controlling. If *May* v. *Heiner* is to be regarded as overruled, then the answer to this question is "Yes," and the correctness of *Hassett* v. *Welch* becomes irrelevant. See answer to Question 7, *infra*, pp. 45–48. See also pp. 37–38, *infra*.

Stat. 169). It was provided in Section 302 (h) of the 1926 Act that:

> Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the *transfers, trusts,* estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, *whether made,* created, arising, existing, exercised, or relinquished *before or after the enactment* of this Act. [Italics supplied.]

The provision seemed clear enough. It stated that "except as otherwise specifically provided," transfers referred to in subdivision (c) were covered, whether made before or after the enactment of the statute. Surely, Congress in enacting amendments to Section 302 (c) in 1931 and 1932 must have been aware of Section 302 (h), and would have "otherwise specifically provided" had it so intended. The regulations in effect at the time of the litigation so construed the statute (Regulations 80 (1934 ed.), Article 18 (b), see Appendix, *infra,* p. 61), although it is true that there was a declaration made by the Commissioner several years earlier that he would apply the amendatory provisions prospectively only. T. D. 4314, X–1 Cumulative Bulletin 450.[13] See Appen-

[13] The ruling in T. D. 4314 was incorporated shortly thereafter in Regulations 70. See T. D. 4336, XI–1 Cumulative Bulletin 329.

dix, *infra*, p. 60. But there was no inconsistency between that earlier ruling and the later 1934 regulations as to the *construction* of the statute. The earlier ruling proceeded in full recognition of the language of the statute which included trusts theretofore established, but the Commissioner refrained from giving full effect to the provisions, apparently because of a view that to do so might be unconstitutional under the decisions of this Court.[14]

We think that the Court erred in relying upon the foregoing rulings when it concluded that it should give the plain language of the statute a meaning other than that which appeared on its face; for we think that those rulings supported the application of the statute in those circumstances. Similarly, we think that a careful reexamination of the statements made on the floor of the House, relied upon in the Court's opinion

[14] The Commissioner stated that "*notwithstanding the provisions of section 302 (h)*" he would apply the amendment prospectively only, "in view of" certain decisions of this Court, which ruled primarily upon, or contained implications concerning, the constitutionality of a retroactive application of the statute. T. D. 4314, X–1 Cumulative Bulletin 451. Thus T. D. 4314 recognized that Section 302 (h) made the provisions of Section 302 (c) applicable to transfers made before March 3, 1931, but undertook, merely because of the constitutional doubts of the then officers of the Treasury, to refrain from applying Section 302 (c) retroactively, "notwithstanding the provisions of section 302 (h)." See Appendix, *infra*, p. 60. And the Government's brief in *Hassett* v. *Welch*, pp. 12–33 showed that such constitutional doubts were unfounded.

(303 U. S. at 310), will disclose that they are at least equally consistent with the result then urged by the Commissioner.[15]

However, the Treasury has acceded to the adverse result in *Hassett* v. *Welch*, and its regulations now take that decision into account.[16]

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[15] For example, the Court referred to a statement made by Mr. Garner to the effect that "We did not make it [the joint resolution of March 3, 1931] retroactive * * *." We think that a fair reading of the debates shows, however, that the word "retroactive" was being used in relation to cases in which the grantors had already died. Both the Treasury and Congress were considerably disturbed that the three decisions of March 2, 1931, would result in refunds of some $25,000,000 in taxes already collected. There was some question as to whether Congress would seek to prevent those refunds, and it is persuasive that the word "retroactive" was used in that sense, as will be disclosed by a full reading of the debates. See Cong. Rec., Vol. 74, Part 7, pp. 7078–7079, 7198–7199.

[16] See Regulations 105, Section 81.18:

Sec. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

(b) Assuming that *Hassett* v. *Welch* is not to be reexamined, we think that a different result should not be reached by reason of the adoption of the Internal Revenue Code in 1939 and the grantor's death thereafter.

The Code did, of course, reenact (see Appendix, *infra*, pp. 59–60) in Sections 811 (c) and 811 (h) simultaneously, the provisions that were included in Sections 302 (c) and 302 (h) of the Revenue Act of 1926, as amended; and the argument could be made that the difficulties encountered in *Hassett* v. *Welch* are therefore no longer present. Thus, it could be argued that Section 811 (h) governs all transfers covered by Section 811 (c) at the time of its incorporation into the Code.

The difficulty with this argument is that the Code was not intended to make changes of substance, but was "intended to contain all the United States statutes of a general and permanent nature relating exclusively to internal revenue, in force on January 2, 1939 * * *. These statutes are codified without substantive change and with only such change of form as is required by arrangement and consolidation." 53 Stat., Part 1, Preface iii. See also the reports of both the House and Senate committees recommending the adoption of the Code, in each of which it was stated that: "It [the Code] makes no changes in existing law." H. Rep. No. 6, 76th Cong., 1st Sess., p. 3; S. Rep. No. 20, 76th Cong., 1st Sess., p. 1.

Accordingly, if Section 811 (c) of the Code is to be applied to transfers made before March 3, 1931, merely because the settlor had reserved a life interest, the result should be based (subject to the qualification in footnote 12, *supra*, p. 29) upon a rejection of *Hassett* v. *Welch* rather than upon the theory that the adoption of the Code made substantive changes.

Question 4

Were the joint congressional resolution of 1931 (46 Stat. 1516–1517), and subsequent related estate tax statutes, intended to be a repudiation of this Court's May v. *Heiner (281 U. S. 238) interpretation of the estate-tax statutes?*

This question may fairly be answered "Yes". Certainly, the Joint Resolution of March 3, 1931 was regarded as an emphatic disapproval of the results reached in *May* v. *Heiner* and, more particularly, the three *per curiam* decisions, *supra*, p. 13, following *May* v. *Heiner*.

As pointed out above, pp. 5–6, the "possession or enjoyment" clause had appeared in the death tax statutes of at least forty States over a period of nearly a century prior to its inclusion in the first federal estate tax statute in 1916. And every state court that had occasion to construe that clause uniformly treated it as including a transfer in which the transferor had reserved a life in-

terest." Indeed, it was said in *Matter of Keeney*, 194 N. Y. 281, 287:

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax, *but the one commonly used is a transfer with reservation of a life estate.* [Italics supplied.]

The decision was affirmed by this Court on the constitutional issue in *Keeney* v. *New York*, 222 U. S. 525. The regulations of the Treasury Department repeatedly took the same view that transfers with a reserved life interest were covered by the statute. Regulations 37 (editions of

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[17] The state cases are collected in the Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, pp. 22–23.

Nor are the state cases to be distinguished, as suggested in the brief of amici curiae herein, p. 7, on the ground that most of them involved legacy or succession taxes rather than estate taxes. It is true that the former impinge on the "receiving" end of the transfer while the latter are imposed on the "giving" end; and it is also true that some important issues may depend upon which kind of death tax is being imposed, such as, where, as between different legatees, the burden of the tax is to fall. *Y. M. C. A.* v. *Davis*, 264 U. S. 47. Cf. *Edwards* v. *Slocum*, 264 U. S. 61; *Stebbins* v. *Riley*, 268 U. S. 137. But the question whether a particular *inter vivos* transfer is a substitute for a testamentary disposition is the same under both types of statutes. Thus, the "contemplation of death" test is the same, regardless of whether the tax is imposed on the giving end or on the receiving end of the transfer. And, as in the case of transfers in contemplation of death, the basic question with respect to the companion clause is whether the transfer accomplishes for the transferor what he might otherwise seek to achieve through a will. Cf. *United States* v. *Wells*, 283 U. S. 102, 116–117.

August 18, 1919, and January, 1921), Article 24;[18] Regulations 63 (1922), Article 20; Regulations 68 (1924), Article 18; Regulations 70 (1926 ed.), Article 18; Regulations 70 (1929 ed.), Article 18. Millions of dollars in taxes were collected by the Bureau of Internal Revenue over a period of about fifteen years, based upon the assumption that the clause was to be so construed. And during that period, Congress reenacted the estate tax in the Revenue Acts of 1918, 1921, 1924, and 1926, each time retaining word for word the clause "intended to take effect in possession or enjoyment at or after his death".

It was not surprising to find, therefore, that Congress was greatly disturbed by the contrary result reached in this Court. We have already referred (*supra*, p. 14) to the remarks of Senator Smoot, Chairman of the Senate Finance Committee, that the decision "came almost like a bombshell, because nobody ever anticipated such a decision." And Congressman Hawley, Chairman of the House Committee on Ways and Means, made the matter equally clear to the House of Representatives, when he said (Cong. Rec., Vol. 74, Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above.

[18] There were two earlier editions of Regulations 37 (October 10, 1916, and May 1917), which, however, were issued in skeleton form, and did not undertake to construe this clause at all.

The form of the Joint Resolution is, we think, not without significance as to the understanding of Congress. For, in providing that transfers with retained life interests were covered by the statute, it did so by adding to the possession or enjoyment clause, the words "*including* a transfer under which the transferor has retained * * *". The use of the word "including" would in itself indicate an intention to make the new provision declaratory of existing law.[19]

Of course, the view that the Joint Resolution was a repudiation of *May* v. *Heiner* would lead to a result that is broadly inconsistent with *Hassett* v. *Welch,* but not strictly so. For all that was actually decided in *Hassett* v. *Welch* was that the new provisions themselves were prospective only. There was no issue raised or decided as to whether the old provision (i. e., the "possession or enjoyment clause" itself) might be regarded as effectively governing such transfers. The issue that was argued and decided in that case presupposed that the new provisions constituted the basis for the imposition of the tax. (For a fur-

[19] To be sure, when the new provisions added by the Joint Resolution were revised in 1932 in the form in which they now appear, the structure of the subsection was changed so as to eliminate the word "including", and to deal separately with transfers involving retained life interests. See Appendix, *infra*, pp. 58–59. However, that change was probably not significant, and was undoubtedly prompted solely by considerations of draftsmanship, since the reserved life estate provisions were expanded and their formulation was facilitated by the revised structure of the subsection.

ther development of this idea, see answer to Question 7, *infra*, pp. 45–48.)

Question 5

Did the May v. *Heiner estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in Helvering* v. *Hallock (309 U. S. 106)?*

The answer to this question is "No". The reasons supporting this answer have already been set forth in large part in the introductory discussion (*supra*, pp. 5–18) and in the answers to Question 1 and Question 4 (*supra*, pp. 18–26, 34–38).

As we have already pointed out, *May* v. *Heiner* was not explicitly overruled by the *Hallock* case. At the same time, we think that the *Hallock* case reflects an interpretation of the statute that is inconsistent wih *May* v. *Heiner*. The essence of the ruling in *May* v. *Heiner*; (see *supra*, pp. 13–14, 22–24) was that the statute did not apply since "title" to this property had been definitely fixed by the trust deed. The same philosophy was the basis for the decisions in the *St. Louis Trust Co.* cases that were overruled by the *Hallock* case.

The opinion in the *Hallock* case indicates at the outset an approach that is at variance with *May* v. *Heiner*. The Court said (309 U. S. at 110–111):

> We must put to one side questions that arise under sections of the estate tax law

> other than § 302 (c)—sections, that is, relating to transfers taking place at death. Section 302 (c) deals with property not technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.

See also *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 110–111. And the Court in the *Hallock* case expressly referred to *May* v. *Heiner* in terms that certainly do not suggest any continued vitality for that decision (309 U. S. at 120, fn. 7):

> * * * it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the *St. Louis Trust* cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded *May* v. *Heiner* doctrine.

Moreover, the dissenting opinion of Mr. Justice Roberts regarded the decision in *May* v. *Heiner* as "indistinguishable in principle" (309 U. S. at 127) from the *Hallock* case.

Support for the view that the *Hallock* case overruled *May* v. *Heiner* is found in Paul, *Federal Estate and Gift Taxation* (1942), Vol. 1, Sec. 7.15, pp. 337–342; also 1946 Supplement, Sec. 7.15, pp. 144–156. Attention is particularly invited to the last paragraph on page 341 of the 1942 edi-

tion, which reads as follows, exclusive of footnotes:

> The question is whether the *Hallock* decision changed the interpretation of pre-1931 statutory law. This is the question dealt with by the Board in the *Hughes* case. The Supreme Court may well have exercised its right of self-correction in this respect as well as in respect to the "reverter" principle of *Helvering* v. *St. Louis Union Trust Company*. If, as Mr. Justice Roberts intimated in his dissenting opinion in the *Hallock* case, the Supreme Court demolished more of the past than is admitted in the majority opinion, the destruction is justified by the reasoning of that opinion. If the Court can correct one error, it can by the same token correct two.

See note, *Inter Vivos Transfers and the Federal Estate Tax*, 49 Yale L. J. 1118, 1122–1123 (1940). See also Judge Frank's dissenting opinion in *Helvering* v. *Proctor*, 140 F. 2d 87, 89–91 (C. C. A. 2).

Question 6

Under Section 811 (c) is the "possession or enjoyment" of the corpus of an inter vivos trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

This question should be answered "Yes", although a contrary result is indicated by *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

We have pointed out above that the "possession or enjoyment" clause was intended to reach substitutes for testamentary dispositions; that it does not deal with technical transfers of title, but rather with the postponement of the actual possession or enjoyment of the ultimate taker until at or after the decedent's death; that the decisions of this Court have not been wholly consistent in dealing with this clause; and, in the light of the Court's apparent willingness to examine the problem along fundamental lines, we have suggested that the Court expressly reject those decisions which fail to give effect to the plain language and obvious purpose of this clause. (*Supra*, pp. 5–18, 18–26, 38–40). The circumstances spelled out in Question 6 furnish an additional ground in the present cases for applying the statute here. The fact that the settlor named himself as cotrustee with broad powers of control [20] which were to continue during his lifetime gives emphasis, if further emphasis be

[20] The circumstances that the settlor reserved these powers in his capacity as a cotrustee, as distinguished from some other capacity, should not make any difference. Although it is true that a trustee owes certain fiduciary obligations to the beneficiaries, it is also true that the retained powers may be exercised with his own interest in mind where there is no violation of the beneficiaries' rights. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 176–177.

needed, to the conclusion that the possession and enjoyment of the beneficiaries was postponed at least until the settlor's death and that the transfers were intended as substitutes for testamentary dispositions.

In the *Spiegel* case, the decedent had named himself and Modie J. Spiegel as trustees. The corpus of the trust originally consisted of shares of stock in Spiegel's House Furnishing Company and in the Spiegel May Stern Company (R. 126). The trustees were given the following powers (R. 126–127):

> 1. The said Trustees, and the survivor of them, or any successor trustee, shall have full, absolute and complete power to hold, manage and control said shares and every part thereof; to sell, exchange, transfer or otherwise dispose of the same, or any part thereof, and to invest and reinvest the proceeds derived from any such sale or sales, or other disposition of said shares, or any part thereof, during the continuance of this trust. While said shares of stock, or any substitutes therefor, are held by said Trustees, or the survivor of them, or any successor Trustee, if any corporation whose stock or other securities are held by said Trustees should require any action of any kind to be taken, said Trustees, and the survivor and any successor trustee, shall have the same right to take any action which may be required of any stockholder or holder of any securities of any such

> corporation as if said Trustees, and the survivor and any successor held such shares or said securities in their own individual names and were the sole owners thereof.

And the trust instrument contained a spendthrift provision preventing the beneficiaries from anticipating any payments to which any of them might be entitled, by any order, assignment or otherwise (R. 87).

In the *Church* case, the settlor named himself and two of his half-brothers (E. Dwight Church and Charles T. Church) as co-trustees with broad powers, including the power in himself to name substitute trustees in the event of a vacancy (R. 5–6). The corpus of the trust consisted of shares of stock in Church & Dwight Co., a closely-held family corporation (R. 8). The controls retained by the settlor in the *Church* case are perhaps even more significant than those in the *Spiegel* case; for they were coupled with a life interest in the settlor, and he retained in his individual capacity the power to veto the sale of the trust assets and to control reinvestments (R. 5). Here, as in the *Spiegel* case, it was clear that none of the remaindermen could have obtained full dominion over the property so long as the settlor lived; and in each case, his death was the indispensable event upon which the actual possession or enjoyment of the ultimate takers depended.

However, as noted above, the *Northern Trust* case rejected as immaterial the settlor's reserved

powers of management. 278 U. S. at 346–347. While we hesitate to suggest that the *Northern Trust* case should be disapproved on this ground alone,[21] we think that this ground, coupled with the general basic considerations discussed above

[21] Only on a few occasions has any attention been paid in the courts to the existence of reserved management controls in relation to the estate tax. In *Commissioner* v. *McCormick*, 43 F. 2d 277 (C. C. A. 7), the court took a more serious view of the significance of such controls. The case involved a transfer in trust with the following features: (1) reservation of income to the settlor; (2) reserved power of revocation with the consent of one of the three principal beneficiaries in the remainder; (3) reversion of the corpus to the settlor if she survived the beneficiaries; and (4) broad powers of management reserved to the settlor. The court, after ruling that the first two considerations could not support the tax, held that the settlor's reversionary interest justified the tax and concluded that the managerial powers were "some evidence of the settlor's intent to postpone the effective date of the beneficiaries' enjoyment and possession of the corpus of the trust estate until after the settlor's death" (p. 280). That decision was reversed in a *per curiam* opinion on the sole authority of *May* v. *Heiner*, without any discussion of this point. *McCormick* v. *Burnet*, 283 U. S. 784.

Schneider v. *Commissioner*, 35 B. T. A. 183, 188–189, is a case in which the settlor's reservation of income and of the right to manage and control certain real estate placed in trust by him was regarded as vital in sustaining the tax.

In *Helvering* v. *Duke*, 290 U. S. 591, the decedent had reserved the right to regain the corpus in the event that he survived the beneficiary, and he also retained wide powers of control as trustee. The Government sought to sustain the tax upon both grounds, and, particularly, made an extensive argument upon the second ground. See Government's brief, No. 25, 1933 Term, p. 23 *et seq.* Since the case was disposed of without opinion by an equally divided Court, it is not clear to what extent any of the four justices voting to sustain the tax were persuaded by that second ground.

may appropriately call for reexamination of that case.

Question 7

In the light of this Court's opinion in Helvering v. Hallock does the Hassett v. Welch (303 U. S. 303) interpretation of the 1931 Congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

The answer to this question is "No". It is assumed that this question presupposes that the rationale of *May* v. *Heiner* is inconsistent with the opinion in *Helvering* v. *Hallock,* at least in the sense that the Court which decided the *Hallock* case would have applied its reasoning to a trust in which the string suspending enjoyment consisted solely of the retention of income for life. It has been argued, however, that the *Hallock* decision, however inconsistent with *May* v. *Heiner,* did not overrule it since otherwise it would also have been compelled to overrule *Hassett* v. *Welch.* See majority opinion in *Helvering v. Proctor,* 140 F. 2d 87, 89 (C. C. A. 2). Phrased another way, this contention is that *Hassett* v. *Welch* construed the Joint Resolution as precluding taxability of such trusts created before its enactment.

This argument was made in *Estate of Hughes* v. *Commissioner,* 44 B. T. A. 1196, and rejected

on the ground that *Hassett* v. *Welch* merely reaffirmed the doctrine of *May* v. *Heiner* as to pre-Resolution transfers and that without *May* v. *Heiner* it has no remaining force (p. 1202). The argument was also rejected by Judge Frank, dissenting in the *Proctor* case. He points out that the parties did not argue the repudiation of *May* v. *Heiner* and confined the issues to the retroactive application of the Joint Resolution. See also *supra*, pp. 37–38. It may be noted that the only method available to Congress to override the result of *May* v. *Heiner* was to use new language. If such language in fact created a new type of liability it was arguable that its retroactive application might be unconstitutional, and, therefore, that the new provision was to be applied prospectively only.[22] This, however, does not preclude

[22] Indeed, the fear of unconstitutionality appears to be the consideration that originally led to the Treasury ruling that the Joint Resolution would be applied prospectively only, "notwithstanding" the provisions of the statute which seemed to require a retrospective operation. See T. D. 4314, X-1 Cum. Bull. 450, discussed, *supra*, pp. 30–31. Of course, even the retrospective operation would have been such in a limited sense only; for it would have been retrospective only in the sense that the transfer had been executed previously. But decisions such as *Nichols* v. *Coolidge*, 274 U. S. 531, and *Coolidge* v. *Long*, 282 U. S. 582, indicated a rather inhospitable approach to such constitutional issues in death tax cases at that time (cf. also *Heiner* v. *Donnan*, 285 U. S. 312), and it was that reason, rather than a requirement of the statute itself that undoubtedly accounted for the Treasury's original determination not to press its application to transfers made prior to the Joint Resolution.

a reconsideration of the scope of the original statute even though an overlapping might thereby result.

The point is discussed in Paul, *Federal Estate and Gift Taxation,* Vol. 1, p. 341, where it is stated:

> Congress in the Joint Resolution dealt with a situation created by a Supreme Court decision, and expressed partial disapproval of the decision by amending the statute to do away with the effect of the decision *for the future:* It did nothing more as to the past than leave the statute as it was. The determination of legislative intent in the previous law passed by another Congress was not within the jurisdiction of the Seventy-second Congress, but rather of the courts. The Seventy-second Congress might, of course, have enacted a statute covering the law of the past, but it did not attempt to do so. This failure to deal with the law of the past may even have been induced by a misconception of previous law fostered by the Supreme Court of 1930 and 1931. But it is nevertheless inaction as to the past, and the Joint Resolution left pre-1931 law untouched and unchanged.

A parallel situation is provided by the amendments to what is now Section 811 (d) made by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which were occasioned by the decision of *White* v. *Poor,* 296 U. S. 98. Section 811 (d) (1), applicable to transfers made after June 22,

1936, expressly includes in gross estate transfers subject to a power to "alter, amend, revoke, or terminate". Section 811 (d) (2), applicable to transfers on or before June 22, 1936, omits the word "terminate". Prior to the amendment it was uncertain whether a power to terminate was included within the power to "alter, amend, or revoke". Although Congress stated that the amendment inserting the word "terminate" was only declaratory of prior law (H. Rep. No. 2818, 74th Cong., 2d Sess., p. 10) the new express provision was still given only prospective application because of a desire not to impose tax on prior transfers not compelled by prior law. This Court nonetheless held in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, that a power to "alter, amend, or revoke" included a power to terminate so that the transfer was taxable even though made prior to the 1936 legislation. It is believed that a similar holding should be made with respect to the Joint Resolution. If the Resolution was necessary for the taxing of transfers with income reserved, *Hassett* v. *Welch* determined its prospective application. The decision should not, however, be considered as "freezing" the construction of the possession or enjoyment clause.

Question 8

Assuming that under the "refined technicalities of the law of property" the "possession or enjoyment" of the trust properties here be

deemed to have passed to the beneficiaries when the trust was created, are the transfers so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes? (See Helvering v. Hallock, p. 112.)

The answer to this question is "Yes". The phrase "possession or enjoyment" is not used in Section 811 (c) of the Code or in comparable sections of earlier estate tax statutes according to the "refined technicalities of the law of property". See *Helvering* v. *Hallock,* pp. 112, 118. Hence whether possession and enjoyment might be deemed to have passed under the refined technicalities of the local property law to the beneficiaries when the respective trusts were created is an immaterial consideration. Cf. *United States* v. *Pelzer,* 312 U. S. 399, 402–403.

We have shown in our discussion of earlier questions that transfers "intended to take effect in possession or enjoyment" at or after the decedent's death were by nature substitutes for or akin to testamentary dispositions; that the classification of them by Congress in the same category with transfers "in contemplation of death" clearly indicated a purpose on the part of Congress to include such transfers in the decedent's gross estate whether or not anything "passed" in a technical sense from decedent at his death; and that where possession and enjoyment are actually retained by the decedent until his death or the

decedent's death determines the time and right to actual possession or enjoyment by some other person, then the very nature of the transfer shows it to have been intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of the statute. The constitutional validity of a provision requiring the inclusion in the gross estate of such transfer is no longer open to serious question. See *Fernandez* v. *Wiener*, 326 U. S. 340; *Helvering* v. *Bullard*, 303 U. S. 297; *Tyler* v. *United States*, 281 U. S. 497; *Milliken* v. *United States*, 283 U. S. 15.

A transfer, as in the *Church* case, with reservation of income, accomplishes every purpose of a will except that it deprives the donor of the power to make further disposition of his property between the time of the transfer and his death. The donor, like the testator, continues in possession or enjoyment until death and no beneficiary obtains full dominion until that time. In addition, in the *Church* trust the interest of each beneficiary was defeasible if he predeceased the donor so that he did not even have a readily salable remainder. This is true whenever death determines the choice of beneficiaries even though the donor retains no reverter. That the *Church* transfer was motivated by the same considerations as lead to testamentary dispositions of property and was truly a substitute for or akin

to a testamentary disposition is further confirmed by the indenture itself. At the time of the transfer Church was 21 years of age, was unmarried and had no lawful issue. Nevertheless the indenture provided (R. 4):

> Whereas the said Francois L. Church is desirous of making provision for any lawful issue which he may leave at the time of his death as well as provide an income for himself for life in the manner hereinafter set forth.

In the *Spiegel* case the beneficiaries of the remainder interests could not obtain possession or full dominion until the death of the decedent, and they had to survive the decedent in order to obtain the property. It is precisely in such circumstances as these that the statute undertakes to impose the tax, and insofar as any remainder beneficiary is concerned his position is similar to that of a legatee of a will whose legacy might lapse by his death prior to that of the testator. In the light of the *Hallock* decision, the principle seems to be well established that the application of the statute is not necessarily based upon the termination of the donor's enjoyment. It applies regardless of the disposition of the income if the interest of the remainderman is conditioned upon his survival of the donor. But if the *Hallock* trusts were "testamentary in effect" although the income was at all times payable to

the beneficiary,[23] the *Spiegel* transfer becomes distinguishable only because of the remoteness or absence of the reversionary interest. The statute, however, was never intended to turn upon these differences in degree. (Cf. *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 111–112; *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116.) The statute is phrased in terms of the postponement at least until the donor's death of the possession and enjoyment of the ultimate beneficiary and since such postponement in the *Spiegel* case operated in similar manner as in the *Hallock* case, it is, we believe, within the principle of that decision.

Question 9

What is the effect of the rulings of Helvering v. Clifford (309 U. S. 331) upon these trusts?

This question appears to be closely related to Question 6, and we refer the Court to our answer to that question in this connection.

Strictly speaking, the *Clifford* case has no necessary effect upon the applicability of the possession or enjoyment clause of Section 811 (c) to these trusts. However, if the *Clifford* case did apply to any trust, it would be strongly persuasive

[23] Of course, the outstanding income interest was excluded in the *Hallock* case, whereas there were no outstanding income interests in the instant cases that were unaffected by the decedent's death. See *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, 113.

that the transfer was covered by that clause; for the *Clifford* case held that a settlor was taxable upon income that was not in fact payable to him, on the ground that he had retained so many attributes of ownership as to justify the conclusion that he continued to be the owner of the trust property. In such circumstances, it would be but a short step to conclude that the transfer was not intended to take effect in possession or enjoyment in the hands of the beneficiaries until the termination of the settlor's interest and dominion.[24]

Considering this concept in relation to the *Church* case, it is at once apparent that a far stronger situation is presented here for the application of the possession or enjoyment clause. For the settlor of a trust governed by the *Clifford* case is charged with income that he in fact has not received; whereas the settlor in the *Church* case explicitly reserved the income to himself.

[24] Indeed, it is even arguable that a trust covered by the *Clifford* doctrine should be included in the gross estate under Section 811 (a), which in a sense corresponds to the general provisions in Section 22 (a) defining gross income. Section 811 (a) is the basic provision requiring the inclusion in the gross estate of all property owned by the decedent at his death. And where the settlor remains in substance the owner of the trust property for purposes of Section 22 (a) under the *Clifford* case, it is highly persuasive that it should be included in his gross estate under Section 811 (a), unless there is a specific statute providing otherwise. See *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 58–59. However, the Government has sought in the present cases merely to include these trusts in Section 811 (c).

He may thus be regarded all the more as withholding the possession or enjoyment of the property from the other beneficiaries during his lifetime, when he reserves to himself the actual fruits of the property in addition to a measure of control over the corpus. And it is certainly arguable that the retention of such control is sufficient to distinguish the case from *May* v. *Heiner*.

In the *Spiegel* case, on the other hand, the settlor did not reserve the income to himself, and it is improbable that the income would be charged to him under the doctrine of the *Clifford* case. See Section 29.22 (a)–21 (e) of Regulations 111, as amended by T. D. 5567, 1947–2 Cum. Bull. 9, 12. It does not follow, however, that because the income would not be taxable to the settlor the corpus cannot be included in his gross estate. The suspension of the enjoyment of the corpus until death, although of no necessary significance for income tax purposes, is so important for the possession or enjoyment clause of the estate tax statute that the retention of far less in the way of administrative control (if the retention of any such control be required) over the corpus should be sufficient for estate tax purposes than is necessary for income tax purposes under the *Clifford* doctrine. However, we do not mean to suggest that the settlor in the *Spiegel* case did not retain substantial powers, and we refer the Court to our answer to Question 6 for a discussion of that phase of the case.

CONCLUSION

Although the decisions of this Court with respect to the basic issues in these cases are extremely difficult to reconcile with one another, the Treasury has tried to harmonize them, and the result of that endeavor is reflected in comprehensive regulations covering this field. We now renew the contention made when these cases were first submitted, that these regulations are valid and that both cases are covered by the regulations.

On the other hand, if the Court desires to analyze the problem on a more basic level, as indicated by the questions raised in the order for reargument, we submit that cases such as *May* v. *Heiner* and *Reinecke* v. *Northern Trust Co.* should be explicitly overruled. Such a disposition of these cases would produce a more consistent body of law, in consonance with both the plain language and obvious purpose of the statute. The result would be a sounder administration of the estate tax law in which taxability would not be made to rest upon such tenuous grounds as are now determinative under the decisions.

In either event, the judgment of the Court of Appeals in the *Spiegel* case, No. 3, should be affirmed, and the judgment of the Court of Ap-

peals in the *Church* case, No. 5, should be reversed.

Respectfully submitted.

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SEPTEMBER 1948.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9 [as originally enacted]:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 [Italics added to indicate new language]:

* * * That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons

who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * *

* * * * *

(h) *Prior Interests.*—Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

T. D. 4314, X-1 Cum. Bull. 450 (1931):

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

* * * * *

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, jr.,* v. *Lurnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

Treasury Regulations 80 (1934 ed.):

Art. 18. *Transfers with possession or enjoyment retained.*—(*a*) *Tranfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(*b*) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Treasury Regulations 80 (1937 ed.) [as amended by T. D. 5008, 1940–2 Cum. Bull. 286]:

Art. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full considera-

tion in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. *Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer,* and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, *without regard to the time when the transfer was made,* whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The

value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S., 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S., 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a

gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death. [Italics supplied.]

Treasury Regulations 105, promulgated under the Estate Tax Provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264] *Transfers Intended to Take Effect at or After the Decedent's Death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred

interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * * *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

* * * * * *

SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)

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Nos. 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1948

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL.,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS E. CHURCH, DECEASED;
EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER OF INTERNAL REVENUE

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 5

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY

SUPPLEMENTAL MEMORANDUM FOR THE COMMISSIONER OF INTERNAL REVENUE ON REARGUMENT

In our brief on reargument, it was stated that at the time of the adoption of the first federal estate tax statute in 1916 the state courts had uniformly held that a retained interest in the corpus was not essential to the applicability of

the "possession or enjoyment" clause (pp. 6–7). That statement is certainly not open to dispute where the decedent has retained an interest in the income, but the taxpayers in the *Spiegel* case dispute the statement as applied to transfers where no income was reserved, and, in their reply brief on reargument (p. 4), they cite a number of state decisions which are asserted to support their position. We submit that those state cases do not support their position.

In the first place, it will be noted that all of those cases were decided after 1916, the earliest having been decided in 1924 and the latest in 1947. And the only one that is squarely in point on the facts (*Chase* v. *Commissioner*, C. C. H. State Inheritance, Estate and Gift Tax Service (7th ed.) Dec. No. 16,186 (Minn. B. T. A. 1947), has recently been reversed on appeal and the tax sustained. *Chase* v. *Commissioner of Taxation*, 33 N. W. 2d 706 (Minn. 1948).

Many of the cases cited by the taxpayers in the *Spiegel* case are not in point because they present situations where the provisions for distribution of the corpus were not made dependent upon the grantor's death. In *State* v. *Welch's Estate*, 235 Mich. 555, 209 N. W. 930 (1926), for example, the court explicitly pointed out (209 N. W. at p. 934) that the grantor's death made no difference to the beneficiaries and the trust did not end with her death. Other cases cited by the taxpayers that are similarly distinguishable are: *In re Mar-*

shall's Estate, 179 Minn. 233, 228 N. W. 920 (1930); *In re Thompson's Estate,* 147 Ohio State 119, 68 N. E. 2d 71 (1946); *In re Hazelton's Estate,* 148 Ohio State 127, 73 N. E. 2d 799 (1947); *In re Dolan's Estate,* 279 Pa. 582, 124 Atl. 2d 176 (1924); *In re Prange's Will,* 201 Wis. 636, 231 N. W. 271 (1930).

Highfield v. *Equitable Trust Co.,* 34 Del. 509, 155 Atl. 724 (1931), dealt with a peculiar statute which employed the word "belonging", and the court stressed this in making its decision. The court said that under the statute something had to pass at death to support the tax and cited *Reinecke v. Northern Trust Co.,* 278 U. S. 339, as analogous. Certainly the *Highfield* case is no authority for the law as it existed in 1916, and at most reflects the influence of the *Reinecke* case.

Cases such as *People* v. *Northern Trust Co.* 330 Ill. 238, 161 N. E. 525 (1928); *People* v. *McCormick,* 327 Ill. 547, 158 N. E. 861 (1927); *In re Townsend's Estate,* 349 Pa. 162, 36 Atl. 2d 438 (1944); *In re Glosser's Estate,* 355 Pa. 210, 49 Atl. 2d 401 (1946), appear to turn on whether the interests of the beneficiaries were vested (indefeasible) or contingent (defeasible), and hold against the tax where the interests of the beneficiaries were indefeasible at the time of the deed and did not depend upon survivorship. This is particularly apparent from the language appearing in 327 Ill. at pp. 556–557, and 349 Pa. at p. 169. Such cases are different from the *Spiegel*

case, where the interests of the beneficiaries in the corpus were in fact contingent and depended on survivorship.

Moreover, in addition to the various state cases already referred to in our brief on reargument (p. 7, fn. 3; p. 21, fn. 9; p. 35, fn. 17), the following are particularly relevant, since they indicate that trusts of the *Spiegel* type are covered by the "possession or enjoyment" clause; *Matter of Dunlap*, 115 N. Y. Misc. 580 (1921), affirmed, 205 N. Y. App. Div. 128, 130 (1923); *State St. Trust Co.* v. *Treasurer*, 209 Mass. 373, 378 (1911); *Appeal of Seibert*, 110 Pa. 329 (1885); *In re Hollander*, 123 N. J. Eq. 52 (1938).

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OCTOBER 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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IN THE

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

Petitioners pray the Court to grant a rehearing of the decision in the above entitled cause.

The decision here would have been astounding enough if the Court had first decided that Spiegel had unintentionally, but *certainly*, retained a possibility of reverter by operation of law, worth $100 at his death, and had then held, because of that possibility, that $1,140,000 must be added to gross estate for estate tax purposes. It is, however, incredible that the Court would subject the estate to that additional liability without first deciding—without even being certain in its own mind—that Spiegel held *any*

possibility of reverter when he died. Yet that is just what the Court has done.

In effect, the Court has said here:

> Petitioners may be taxed under section 811(c) only if the Spiegel trust set up contingent remainders. The Court would be justified in deciding that the remainders were vested and, hence, that no reverter existed. It would also be justified in holding that they were contingent. However, the Court need not determine the question of vested or contingent—the question without the answer to which the case cannot be decided—because the Court of Appeals decided that the remainders were contingent. Of course, the Court of Appeals may have erred (who knows!) but, right or wrong, $1,140,000 should be added to gross estate on account of the reverter, if any, which would have been worth less than $100 if it existed—and the Court does not decide that it existed.

Neither logic nor precedent justifies this result. This Court took the case. It has been argued twice. It has been considered by the Court for over twelve months. Before the Court subjects petitioners to payment of a fortune in additional taxes solely on account of a $100 possibility of reverter, it should, we submit, either itself decide that a reverter existed or send the case back so that an Illinois Court may decide whether or not there was a reverter.

1. Under Illinois law, the Spiegel remainders were vested and there cannot possibly be a reverter by operation of law after a vested remainder. This Court should so hold.

There is no need for argument whether, if the Spiegel trust failed, there would be a reverter. If there was a failure, a right of reverter would exist. But a failure was possible if (and only if) the remainders were contingent. The settlor of a *contingent* remainder, in reality,

retains an equitable reversion until it can be determined whether the contingency upon which the remainder can vest will occur; in a real sense, he has not given away the equitable reversion after the contingent remainder.' *Peterson* v. *Jackson*, 196 Ill. 40, 49 (1902). *Richardson* v. *Roney*, 382 Ill. 528, 537 (1943). See also, Fitch, Real Estate Titles in Illinois, pp. 61-2 (1948). If, on the other hand, the remainders were vested (and they were), the trust could not possibly fail since a trust, which provides for a vested remainder, disposes of the entire interest of the settlor and cannot fail; upon the death of a vested remainderman, the remainder passes to his heirs or legatees.[1] Absent a failure of the trust, there could be no reverter. Counsel do not disagree on this hornbook law, but there is a misapprehension in the Court's opinions.[2] The question for decision is clear cut. It is: Were the remainders vested? If so, there can be no question of failure of the trust and no

1. See Petitioners' Brief pp. 15-16, 21-23; Reply Brief 3-5. Upon the death of a *vested* remainderman, the value of his remainder is included in his gross estate for estate tax purposes under section 811(a) of the Code. See *Kinney's Estate* v. *Commissioner*, 80 F. 2d 568, 569-72 (CCA 9th, 1935); *Frazer's Estate* v. *Commissioner*, 162 F. 2d 167, 168 (CCA 3d, 1947).

2. See majority opinion p. 6: "It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor." Even if all named beneficiaries died, there would be no reverter, under state law, unless the beneficiaries held *contingent* remainders. Suppose a trust to A for the life of settlor with remainder in fee to B upon settlor's death. If B dies before settlor, B's heirs or legatees will take B's *vested* remainder. The heirs or legatees are, in effect, substituted beneficiaries and it may not be said, in any true sense, that all beneficiaries of a *vested* remainder ever die before the settlor.

See also concurring opinion (p. 14), approving language of the Court of Appeals (which referred to, and is true only of, a *contingent* remainder) to the effect that if no beneficiaries survived, the trust would fail and revert. The concurring opinion cites, among other authorities, Restatement, Trusts, § 411, and 3 Scott, Trusts, § 411, which refer to failure of trusts. The same authorities state that a *vested* remainder cannot fail. See Restatement, Trusts, § 411(*b*), and 3 Scott, Trusts, § 411.5.

possibility of reverter under Illinois law or, for that matter, American property law generally. Decide that the remainders were contingent and there was a possibility of reverter. Decide that they were vested and there was no possibility of reverter. The question to be decided is the character of the remainders; a failure of the trust and a reverter (resulting trust) were an impossibility or possibility depending upon whether the remainders were vested or contingent.

The court below decided that the remainders were contingent under Illinois law on the authority of a single *Federal* decision—*Klein* v. *United States*, 283 U. S. 231 (1931). It cited no Illinois authority on the basic vesting problem. It contented itself with a decision of this Court on a state of facts, which could hardly have been more unlike the Spiegel facts.[3] Petitioners, on the other hand, cited many Illinois decisions to the effect that remainders, similar to those at bar, were vested.[4] The Court of Appeals tossed out all petitioners' authorities on the theory (not raised in briefs or argued) that they involved wills and were inapplicable because "there can be no divesting of * * * rights except as provided in the will." Illinois law, however, is clear that *no* vested remainder (whether under will or *inter vivos* instrument) can be divested except under the exact conditions specified in the trust.[5] And rules with respect to vesting apply to remainders set up by *inter vivos* trusts as well as to those set up by wills.[6] Ironically, this Court decided that

3. See table in Petitioners' Brief p. 31.

4. See Petitioners' Brief pp. 17-20.

5. See Petitioners' Brief pp. 22-25.

6. See *Peadro* v. *Peadro*, 400 Ill. 482, 487 (1948):

"It is a well-established principle that the law favors the vesting of estates. Remainders will not be held contingent unless the intention to create such interest clearly appears from the words of the will or *other instrument*. * * * The law favors a construction which vests an absolute estate rather than a contingent or defeasible one. * * * The reason

the *Klein* remainder (created by *inter vivos* deed) was contingent on the authority of two Illinois decisions, both involving wills (*Haward* v. *Peavey*, 128 Ill. 430 and *Baley* v. *Strahan*, 314 Ill. 213) and both referred to in the portion of the *Klein* opinion, quoted by the Court of Appeals.

Except for the Illinois wills cases, contained in the quotation from the *Klein* opinion, the opinion of the court below, which purports to lay down Illinois law on vesting of remainders, cites Illinois decisions only on the following matters:

(a) In footnote 4, it listed certain of the decisions on which *petitioners* relied.

(b) It cited Illinois decisions for the proposition that "it could not be disputed that if there were no takers under the *will* at the time of the testator's death, the property would be intestate property." There is no explanation why it is necessary to cite Illinois or any other authority for that proposition; it would not be disputed by anyone.

(c) It cited an Illinois Appellate Court decision (*Lill* v. *Brant*, 6 Ill. App. 366, *reversed* 96 Ill. 608,

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for thus favoring vested rather than contingent estates and indefeasible rather than defeasible ones is to prevent the exclusion of property from the natural laws of descent and *to permit and promote the unrestricted alienation of property*, and not leave it tied up or uncertain for long periods, awaiting the happening of some contingency in the future. * * *" (Italics ours.)

See also, 3 Restatement of the Law of Property, § 243(c):

"The act of drafting and executing a will generally connotes an intention on the part of the testator to make complete disposition of his assets. Similarly the act of executing and delivering *a deed or instrument of gift* as to specific land or other specific thing generally connotes an intention on the part of the transferor to transfer his complete interest in that specific land or other thing. Consequently, the intent commonly prevalent among conveyors justifies the conclusion that, unless a contrary intent of the conveyor is found from additional language or circumstances, he intends to transfer all his assets in the case of a will, *or all his interest in the specific land or other thing, in the case of a deed or instrument of gift*." (Italics ours.)

See also, Petitioners' Brief pp. 27-29; Reply Brief pp. 7-9.

involving neither a testamentary nor an *inter vivos* trust but an escrow to pay creditors; the escrow had terminated because of full payment to the creditors and thus the remaining balance was required to be repaid to the depositor) for the proposition that, when a *contingent* remainder fails, there is a resulting trust to the settlor. We have cited respectable Illinois authorities for the same indisputable proposition.[7]

That is the Court of Appeals opinion of which the Court here says (p. 6):

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. * * * Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

That is the opinion in reliance on which over $1,140,000 is added to gross estate. Taxes are very real. If is, however, utterly unreal to decide a case solely on Illinois law, as the Court has done here, and to find that law in a single decision by an inferior federal court which, in turn, relied upon a single decision of this Court for determination of the Illinois law.

This Court will take cases on *certiorari* when a Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."[8] One of the reasons, relied upon by petitioners for allowance of the writ of *certiorari* here, was that the court below had wrongly decided that the instant remainders were contingent under Illinois law.[9] Respondent sought to limit the writ to the *Dobson* and substantiality issues and opposed the granting of the writ on the Illinois law point, citing the same authorities now cited by the Court (*MacGregor* v. *State Mutual Co.*, 315 U. S.

7. See Petitioners' Brief p. 16.
8. Supreme Court Rule 38, 5(b).
9. See Petition for Certiorari p. 6.

280, and *Helvering* v. *Stuart*, 317 U. S. 154). See Memorandum in opposition to Petition for Certiorari, pp. 8-10. The writ was, however, granted without limitation (R. 211). The Court should, therefore, decide the question of Illinois law—not rely on an opinion of a lower court which is based, not upon Illinois decisions, but upon one opinion of this Court dealing with an utterly unrelated set of facts. Although it be granted *arguendo* that, as the majority opinion says, "reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention," the Court should, nevertheless, decide the question. Regardless of how close a question of law may be, regardless of difficulties and regardless of reasonable arguments, there can be only one correct answer as to the law applicable to any given set of facts at any given time. There will be, we submit, a failure of justice if this Court relies upon a lower court's decision that Illinois law is as *this Court* stated it to be fifteen years before in a very different case.

While the Court at times relies upon the lower Federal court for local law, it is under no compulsion by statute or rule so to do. Thus, it stated, in *Helvering* v. *Stuart*, 317 U. S. 154, 164, that in certain instances "we examined the state cases to determine the applicable state law * * *. We could do the same here * * *."[10] The minority in the *Stuart* case rightly said (p. 172) "we have not wholly abdicated our function of reviewing such determinations of state law [by Courts of Appeals], merely because courts

10. See *Meredith* v. *Winter Haven*, 320 U. S. 228, 237:

"'Accepting this responsibility, * * * this Court [*not the Court of Appeals*] has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state has not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain.'"

See also, *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

of appeals have made them." Here, however, the Court says (pp. 4-5):

> "But the Tax Court's findings of fact showed that the trust contained no provision for disposition of the corpus should the settlor outlive the beneficiaries. This finding of fact, which we accept, plus the Court of Appeals determination of controlling Illinois law, *without more*, brings this trust transaction within the scope of the possession or enjoyment provision of 811(c) as we have interpreted that section in the *Hallock* and *Church* cases." (Italics ours.)

This, we submit with all deference, is abdication. The Court apparently accepts the lower court's determination of Illinois law because (p. 6):

> "It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor."

But the proposition which the Court finds reasonable, is neither the law of Illinois nor even stated by the Court of Appeals to be Illinois law. The lower court held only that (a) the Spiegel remainders were contingent (for which decision it relied, not on Illinois decisions, but the *Klein* opinion of this Court) and (b), being contingent, if there were no beneficiaries to take at the termination of the trust, the trust would fail and revert to the settlor. We conceded, in our original brief (pp. 9, 16), that, if it be erroneously assumed that the remainders were *contingent*, a reverter would have been possible. The court below, however, did not (and we are sure would not) hold that there can be a possibility of reverter after a *vested* remainder. The Illinois law question, upon which the decision of this Court must be based, is whether the instant remainders were vested or contingent. If vested, petitioners must prevail since there could then be no possibility of reverter by operation of law. If contingent, petitioners would lose on the basis of the majority's decision because

a resulting trust and reverter would, in that event, be possible. The question whether a remainder is vested or contingent does not depend on reasonableness but upon local precedents—and the only precedent upon which the Court of Appeals relied to hold the Spiegel remainders contingent was not local.

In this case, we submit that, under all the circumstances, petitioners are entitled to the decision of this Court. There is no doubt that, under Illinois law, the remainders here were vested. On September 29, 1947 (nine months after the Court of Appeals decision), Daniel M. Schuyler, Lecturer on Law at Northwestern University Law School and co-author of Carey and Schuyler on Illinois Law of Future Interests, delivered a lecture before the Chicago Bar Association on "Property Law Still Has Tax Consequences." He discussed fully the Illinois law applicable to the Spiegel remainders. He concluded with respect to the instant case[11] (Appendix p. 258):

> "Let us concede that it is of no significance that it [the Spiegel trust corpus] might return by operation of law rather than by the terms of the instrument. *The cases from Illinois, the property cases, demonstrate conclusively, I think, that the property could not return either by the terms of the instrument or by operation of law.* The only way that it could return to the settlor was by virtue of the possibility that he might at the death of all of the beneficiaries, inherit from them under the laws of intestate succession, a thing which he might do just as easily if he gave the property directly and outright to his children, and they predeceased him.

11. This lecture was published in full in 29 Chicago Bar Record 248 (July, 1948). That issue of the Chicago Bar Record is attached hereto as an Appendix so that the Court may have complete opportunity to examine it. In view of the short time within which to file this Petition for Rehearing, the lecture was not reprinted and we pray the indulgence of the Court with respect to the format of the printing and the character of the paper.

See also, 42 Illinois Law Review 561 (September-October, 1947).

> He then conceivably might be their heir or next of kin, and only to that extent could the settlor, under the Illinois cases, in the *Spiegel* case, have gotten that property back." (Italics ours.)

The Illinois authorities are clear that the state supreme court would hold the remainders vested.[12] The Illinois texts are to the same effect.[13] Even Respondent, having originally conceded that the remainders were vested,[14] ultimately argued only that, although the remainders would have been vested if created by will, the rule, favoring vesting under wills, has no application to an *inter vivos* trust. However, speedy vesting is favored under wills and living trusts both in Illinois and generally.[15]

The Court, we submit, should either:

(a) itself determine whether the remainders here are vested or contingent under Illinois law and, thus, whether Spiegel, at his death, had not or had any possibility of reverter by operation of that law; or

(b) send the case back to the Court of Appeals to be held there pending proceedings under the Illinois Declaratory Judgment Act or otherwise in Illinois courts, which would result in a determination whether the Spiegel remainders were vested or contingent (see *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 483-4 (1940); *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101, 105-6 (1944); *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171-2 (1942); or

(c) remand the case to the Court of Appeals to determine (i) whether Illinois decisions, since the decision of

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12. See Petitioners' Brief pp. 17-20.

13. See Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, § 328.

14. See Petitioners' Reply Brief p. 5.

15. See footnote 6, pp. 4-5, *supra*.

the Court of Appeals,[16] change the opinion of the lower court (now based solely on *United States* v. *Klein*) that the Spiegel remainders were contingent, and (ii) whether, under the instant trust, a grandchild was required, in order to take, to survive both his parent and the settlor or only his parent (see footnote 1, and part I, 3, second paragraph, of Mr. Justice Frankfurter's dissenting opinion; see also, Petitioner's brief, footnote 7, p. 24).

2. Even though Spiegel retained a possibility of reverter by operation of law, he did not intend so to do and, accordingly, the transfer was not "intended" to take effect at death.

The Court has said here that (p. 3) "the taxability of a trust corpus under this provision of § 811(c) does not hinge on a settlor's motives * * *." It goes on to say that any requirement (p. 4) "such as a post-death attempt to probe the settlor's thoughts in regard to the transfer" would partially impair the effectiveness of the "possession or enjoyment" provision of the section "as an instrument to frustrate estate tax evasions." Yet, in every case of contemplation of death there must be "a post-death attempt to probe the settlor's thoughts" and the "contemplation of death" and the "possession or enjoyment" provisions are side-by-side in section 811(c). The section has a single purpose—to "frustrate estate tax evasions"—whether by gifts in contemplation of death or by transfers the effectiveness of which are intended to be postponed. See *United States* v. *Wells*, 283 U. S. 102, 116-17 (1931); *Allen* v. *Trust Company of Georgia*, 326 U. S. 630, 636 (1946).

By the "possession or enjoyment" provisions of sec-

16. *See Freudenstein* v. *Braden*, 397 Ill. 29, 35 (1947). See also *Pedro* v. *Pedro*, 400 Ill. 482, 487 (1948).

tion 811(c) Congress intended to include in gross estate those *inter vivos* gifts "which may be resorted to as a substitute for a will, in making dispositions of property operative at death." *Helvering* v. *Hallock*, 309 U. S. 106, 114 (1940). And says the concurring opinion here (p. 11): "It is impossible for me to look upon the Spiegel or Church trusts as closely akin to a will."

Therefore, even if the Spiegel remainders had been contingent and there had, therefore, been a remote possibility of reverter inadvertently retained, the transfer was, nevertheless, not taxable under § 811(c) as Spiegel did not intend to retain any interest or possibility of interest in the trust property.

3. In any event, if any possibility of reverter by operation of law did exist, its value during Spiegel's life, and his chances of benefiting from it, were so small as to be negligible and should be disregarded for tax purposes.

Substance and not form determines taxability. Thus, the Court said again, in its *Church* opinion (p. 11), "we look to substance not to form * * *." In substance, Spiegel, on any theory, retained nothing of the trust during his life and, in substance, had no possibility during his life of ever acquiring any part of the trust. His estate should, therefore, not be taxed on account of the trust.

If the interest or possibility, which the court holds Spiegel retained, were substantial, it would be difficult to conceive of circumstances which the Court could find evidenced only a formal retention. And the rule laid down here does not protect the Government. It is palpable that, in a situation such as that before the Court, a settlor has no actual interest in any reverter. Therefore, after completion of listing beneficiaries in whom he is really

interested, he need only add a final remainder to the United States of America or to a charitable corporation. Thereby, although, as a practical matter, he gives away nothing which he had not already disposed of, his estate would (using the case at bar as an example) obviate the inclusion of $1,140,000 in gross estate.

Counsel for Respondent, at the second oral argument here, argued, among other things, that *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929), should be overruled. Addressing himself to Mr. Justice Frankfurter, he explained that it was the Government's position that taxability under section 811(c) ought to depend, not upon retention of a remote possibility of reverter by operation of law, but upon termination of the trust and its distribution at the settlor's death. He stated that a million dollars of property ought not to be included in gross estate on account of a comparatively valueless and remote—a "trivial"—possibility of reverter by operation of law.[17] We agree with counsel. It is "trivial"—the quintessence of formalism—to include a million dollars in gross estate, when the settlor at death retained what was, in substance, of no value.

This is an unusual case. It was submitted for decision on October 24, 1947, and held under advisement in this Court until January 17, 1949, a period of thirteen months. It was briefed and argued twice. There is great divergence of opinion among the Justices. The majority finally determined that it would not decide the basic question in

17. Transcript (Ward & Paul) of oral argument before the Supreme Court in case at bar, October 12, 1948 (p. 48):

"Mr. Raum: He had a right to reacquire in the event that he outlived the designated beneficiaries.

"Mr. Justice Frankfurter: He could dispose of that.

"Mr. Raum: Well, that is a trivial—in many cases, a wholly trivial—

"Mr. Justice Frankfurter: That is the heart of the business that he has got some interest left of which he is the disposer.

"Mr. Raum: Well, you do not tax a million dollar estate on the basis of a trivial interest that is retained."

the case but would accept a determination of Illinois law reached by a Court of Appeals through reliance, not upon a pertinent decision of the Supreme Court of Illinois, but upon a Federal decision which is not even close to being in point on the facts. The refusal of the Court to decide the question, which it should decide, results in an unconscionable tax, augmented by interest.

This is clearly one of those exceptional cases in which the Court should grant a rehearing and we pray that the Court will so do.

Respectfully submitted,

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JOSEPH M. WEIL,

Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that (i) he is one of the counsel for petitioners in the above entitled cause and (ii) the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

Chicago, Illinois, January 29, 1949.

HERBERT A. FRIEDLICH.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 3.

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPENDIX TO PETITION FOR REHEARING.

CHICAGO BAR RECORD

PUBLISHED BY THE CHICAGO BAR ASSOCIATION

VOL. XXIX JULY, 1948 NO. 6

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CHICAGO BAR RECORD

JULY, 1948

AND YOUR EDITORS WILL EVER PRAY--

The Revenue Act of 1948 provided welcome relief for taxpayers in all brackets. It also posed plenty of problems for lawyers, especially in connection with the estate and gift tax amendments.

An overflow crowd of members heard the very helpful and instructive lecture, "The New Marital Deduction for Gift and Estate Taxes Under the 1948 Revenue Act," delivered by Don H. McLucas at the rooms of the Association under the sponsorship of the Committee on Federal Taxation. A reprint of this talk has been made available through the courtesy of The Northern Trust Company, which has distributed the pamphlet to all lawyers in the Chicago area.

"Drafting Problems in Wills Under the Federal Revenue Act of 1948" which appears in this issue of the RECORD, is the text of a lecture delivered at the Association by Austin Fleming, also of The Northern Trust Company, as a part of a program arranged by the Committee on Probate Practice. The companion lecture, "Use of Insurance Options Under the 1948 Revenue Act," presented at the same meeting by John H. Overbeck, Jr., will be published in our next issue.

This issue also contains "Property Law Still Has Tax Consequences," the first of two papers read by Daniel M. Schuyler at luncheon meetings of the Association, and "Proposed Legislation Concerning Illinois Utilities," a report on bills drafted by the Committee on Public Utility Law during eight years of careful work. "Amendment of the Revenue Article of the Illinois Constitution," by Walter J. Cummings, Jr., is a scholarly discussion of a timely and to some extent controversial issue. Mr. Cummings is a member of the Committee on Constitutional Convention and his paper is one of a series prepared by members of that committee dealing with the problems of constitutional revision in Illinois.

It is a healthy sign of the vigorous and constructive work of the Association that these authoritative guides to current problems have all been prepared by members of the Association and presented in connection with the regular activity of our committees.

Survey

The Younger Members' Committee is sponsoring an economic survey of Chicago lawyers (not limited to members of the Chicago Bar Association) conducted with the assistance of Professor Leonard Kent of the Graduate School of Business of the University of Chicago. Questionnaires are being mailed to approximately 2,000 lawyers, chosen in such a manner as to constitute a sample representative of the profession in Chicago. A summary of the results, including correlations of income data with educational background, type of practice or employment, and other information, will be published in a future issue of the RECORD. All who receive questionnaires are earnestly requested to cooperate by filling out and returning them, promptly and anonymously.

We regret that regular publication of the RECORD has been interrupted by a work-stoppage in the printing trades. Publication was suspended during the months of March, April, May and June, 1948.

CRIMINAL LAW IN VIGNETTE

By Charles C. Arado

Constitutional and statutory provisions declare the illegality of a coerced confession wrung by police officers regardless of the depravity of the crime or suspect. Nevertheless, a violation of these protective measures in behalf of an accused person persists as a common practice. The third degree, as a substitute for judicial inquiry, contaminates criminal law procedure at its source.

A defendant is presumed sane. That presumption does not extend to evidence, nor is it to incline the minds of jurors to a belief of sanity. It is simply a rule of law to establish the burden of proof when insanity is interposed. By reason of that law, the defense is called upon to introduce some evidence of insanity in order to raise this issue. Were the evidence to end upon conclusion of proof of insanity by the defense, honor and justice would compel a jury to find the defendant insane. No alternative decision could be reached unless the jury concluded that these witnesses were perjurers or their testimony incredible. As soon as this evidence of insanity is before a jury, the prosecution assumes the burden of establishing sanity by proof beyond a reasonable doubt.

A prosecutor seeks to avoid a compromise in penalty that may be inspired by a plea of insanity. Upon a failure of the defense to establish legal insanity, he urges the jury to apply the punishment they would impose in the ordinary case. Sympathy is not to be extended to the defendant because of his emotional instability or abnormality. The State's attorney maintains that mental weakness or deficiency is immaterial unless it precludes ability to recognize the difference between right and wrong or the faculty of choosing the right and avoiding the wrong. This is a sound exposition of the law although directly counter to principles of medical science holding that the mental condition of the defendant is the basic factor to determine moral responsibility for the commission of a crime.

While drunkenness forms no excuse for a criminal act, it is admissible upon the issue of intent. If the intoxication is of such a degree that it suspends entirely the power to reason, no crime can be committed. The difficulty of establishing insanity based upon chronic alcoholism must be apparent. If the intoxication minimizes the degree of deliberation and malice accompanying the act in a case where the jury has the burden of fixing the punishment, that circumstance should be considered in arriving at the penalty. Here too the difficulty of using drunkenness as grounds for extenuation is well-nigh insurmountable. The prosecutor stresses the contention that when the intoxication is voluntary the defendant becomes legally responsible for his subsequent conduct.

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DRAFTING PROBLEMS IN WILLS UNDER THE FEDERAL REVENUE ACT OF 1948

By Austin Fleming

The purpose of this discussion is to consider the effect of the Federal Revenue Act of 1948 on specific provisions frequently employed in the preparation of wills.

Lawyers arrange wills in different ways, but one of the more common arrangements is that which begins with a payment of debts and tax clause, followed by provisions covering personal effects and legacies, and then a residue clause which either gives the property outright or places the estate in trust with particular distributive provisions. Where the residue is placed in trust, the dispositive provisions are followed by various administrative clauses, such as a spendthrift clause, facility of payment clause, undistributed income clause, undivided interests clause, trustee's powers, successor trustee provisions, and finally, by the designation of an executor.

This order will be adopted in the remarks which follow.

Tax Clauses

As to the tax clause, the form most frequently used by attorneys is one which directs the executor to pay all death taxes, both estate and inheritance, from the residuary estate without seeking reimbursement from or charging any person for any part of the taxes so paid. This form of clause would still appear to be appropriate and proper under the new law, subject only to these observations: Some tax clauses specify that death taxes shall be treated as expenses of administration chargeable against the estate generally. With the new concept of "adjusted gross estate" appearing in the new law, which means in essence the gross estate less expenses of administration and widow's award, such a clause may create confusion as to whether the marital fund is or is not intended to bear a part of the tax burden. To avoid any question, would it not be preferable to direct specifically that all such taxes should be paid or provided for out of the residuary estate, in terms?

Also, care must be exercised in the use of waiver of reimbursement clauses, particularly in cases where section 826(d) of the Internal Revenue Code applies, giving the executor of an estate a right of reimbursement with respect to appointive property unless the donee directs otherwise in his will. Where a marital trust is created with a general power in the surviving spouse to appoint the corpus by will, the value of the marital assets will, of course, be included in such spouse's estate at the time of her* death for Federal estate tax purposes. In many cases the spouse's estate will not be sufficient to pay the tax so assessed, in full, or the spouse may not wish her entire estate to be used for the payment of taxes imposed by reason of the inclusion of the marital fund in her taxable estate. In such cases it is important to see that the tax clause in the will of the surviving spouse does not waive any reimbursement rights conferred by section 826(d) of the Code. An additional sentence in the tax clause to the following effect may be desirable:

> **This paragraph shall not be construed as a waiver of any right of reimbursement of any such taxes imposed with respect to any property over which I may have a power of appointment, and to which reimbursement the Executor of my estate would otherwise be entitled by law.**

*The feminine pronoun is to be read as including the masculine, whenever applicable throughout this paper.

The personal effects and legacy clauses raise no special problems. Such gifts, when made to the surviving spouse, will qualify for a marital deduction and should not be overlooked in making calculations.

The Marital Fund

As to clauses establishing the marital fund itself, there is at the outset the question of whether there is any objection to tying the amount of the fund to the exact amount allowable as a marital deduction, particularly in view of the fact that there may be a long lapse of time before values for Federal estate tax purposes are finally determined. No legal objection is seen to such a provision. In fact, it approximates most nearly the community property system without any undershooting or overshooting. The only problem presented is one of computation and the necessity for making required adjustments when final figures are obtained. This is not easy, of course, but it is not essentially different from the familiar process of arriving at the exact amount of a charitable gift expressed in terms of a percentage of the residue of an estate. The indeterminate form of such a provision nevertheless appears to have troubled some attorneys, and they have indicated a preference for a definition of the marital fund in terms of a dollar amount. Where this method is employed, it will be necessary to review the will frequently and by codicil or new instrument make necessary upward or downward revisions, as the value of the estate changes from time to time.

Estates over $60,000 in value but less than $120,000 present a special drafting problem in creating a marital trust of the proper size. Where the balance of the estate is also left in trust for the benefit of the spouse or descendants, it will ordinarily not be desired to create a marital fund greater than the difference between the tax exemption and the adjusted gross value of the estate. The following provision may be considered in such cases:

> **. . . an amount equal to fifty per cent (50%) of the value of my adjusted gross estate as finally determined for Federal estate tax purposes (but in no event in excess of the difference between the value of my adjusted gross estate and the amount of the exemption allowed for the purpose of determining the so-called additional or tentative Federal estate tax), less the aggregate amount of marital deductions, if any, allowed by reason of interests in property passing or which have passed to my wife otherwise than by the terms of this paragraph of my Will.**

Most forms for the establishment of a marital trust fund operate as a separate bequest ahead of the residuary article. The reasons for this arrangement are twofold: to provide the maximum deduction with the greatest tax savings through the fact that by not being a part of the residuary estate, it bears no share of taxes; and to obviate the necessity for the application of the very difficult algebraic computation required if taxes are to be taken into account in arriving at the amount of the marital fund. The amount of the tax cannot be computed until the amount of the deduction has been determined, and the amount of the deduction cannot be determined until the amount of the tax has been computed. The problem is further complicated by differences in rates and methods of computation between the basic Federal estate tax and the additional Federal estate tax, and between each of them and State inheritance taxes.

It has been asked why the marital gift must take the form of a bequest ahead of the residuary and whether it is not possible to provide that the residue should be divided into separate trusts with the trustee, rather than the executor, making allocation, and to direct the tax burden to be shifted to the non-marital fund.

reason is seen why this arrangement cannot be followed with the same result, although it would seem that the net effect is to make the marital fund in fact a special trust ahead of what is really the residuary. The important thing is that in order to qualify under the statute, the marital fund must be a distinct and separate trust. It will not do to place the residue in trust with the income payable entirely or in part to the surviving spouse for her life and a general power of appointment in the spouse over one half of the corpus at her death. The law is clear that in order to qualify for a marital deduction, the power of appointment must apply to the entire corpus of the trust.

In whatever way the attorney chooses to phrase the marital clause, he should not overlook negativing expressly the operation of paragraph (C) of the new law which says in effect that if interests passing to the spouse may be satisfied out of ineligible assets, the value of such interests will be reduced by the aggregate value of such ineligible assets. The surest way to negative this provision is to specify that in no event shall the executor or trustee satisfy the gift out of assets or proceeds of assets with respect to which a marital deduction would not be allowed if so included.

Whether it is advisable to provide for a marital deduction in every case of a married person with an estate larger than that of his spouse, and, if so, whether the maximum marital deduction should be claimed, are estate planning questions, the exploration of which would take us afield from our purpose. Suffice it to say that in the estate of the first spouse to die admittedly large tax savings are obtainable through the device of marital deduction. The alternative of not providing for a marital fund may be a renunciation of the will and the taking of statutory benefits which will qualify for a marital deduction. Each case must, of course, be considered on its own facts and particular circumstances, but in many cases it will undoubtedly prove advantageous to claim the largest possible amount of marital deduction, even though it may appear that by doing so the combined tax bills in the two estates are increased. The value of the use of the property by the surviving spouse in the interim more than offsets the added cost to the remaindermen, and many changes in values, tax laws and rates may occur in the meantime which will invalidate the initial calculations and assumptions as to the amount of taxes payable upon the death of the surviving spouse.

Common Disaster Clauses

This leads to a brief remark about the use of common disaster clauses, and when, if ever, a marital gift should be conditioned on survival for a period of time up to six months as permitted by the statute. Generally speaking, if it is advisable to claim a marital deduction at all, it would seem to be equally advisable whether the spouse survives by one day or many years, and accordingly, where a marital fund is established it follows that the draftsman will not ordinarily wish to condition the gift on survival for any particular period of time. There are two exceptions to this conclusion: One relates to the case of outright gift of the entire estate to the surviving spouse. In such case section 812 (c) of the Internal Revenue Code as amended by the new law, dealing with credit for previously taxed property, provides no deduction for any property received from a previously deceased spouse. Should a surviving spouse who is given the entire estate outright die within a short period after the death of the first spouse, the entire estate, and not just half, would be taxed again in the estate of the surviving spouse. In such a situation it would seem that the draftsman would wish to consider the inclusion of a six month common disaster clause, in order to avoid double taxation of the estate should the surviving spouse die within that period. The second exception applies where the estates of the two spouses are so nearly

equal in amount that the combined tax bills on their deaths will be much greater through the use of the marital device than would otherwise be the case. In those cases, should death of the surviving spouse occur within six months, it might be advantageous not to have the marital gift apply and to have the estate of the spouse first dying taxed as though he were the sole survivor.

The requirements of the statute with respect to a power of appointment in the surviving spouse over the entire marital fund are clear and require no special comment. However, the question does arise as to whether it may be provided that the trustee may rely on a will admitted to probate in any jurisdiction without waiting for the period of contest to elapse; and also assume that the spouse has died intestate in case no will is found within a certain number of months after death. Such a clause operates only after the death of the spouse, is purely procedural and in no way affects substantive rights in case a will is later found and admitted to probate. Accordingly, no objection is seen to the use of such a clause and it has the value of facilitating administration.

It is now clear that the inclusion of provisions naming takers in default of the exercise of the power of appointment will not defeat the right to an estate tax marital deduction otherwise allowable. The Senate Committee report, and more recently an explanatory letter of the Deputy Commissioner dated May 4, 1948, support this conclusion.

Next to be considered are clauses dealing with the administration of marital trusts and questions as to which are compatible with an estate tax marital deduction.

All of the Income

The statute says that the marital deduction is available with respect to a marital trust only if the surviving spouse is entitled for life to "all of the income" from the corpus of the trust, payable annually or at more frequent intervals. Does "all of the income" mean gross income, or income after deducting trustee fees and ordinary expenses? The Senate Committee report explains that the term "income" is used in the same sense as that in section 162 of the Internal Revenue Code relating to the taxation of income of estates and trusts. That section speaks of the "net income" distributable to a beneficiary and states that net income in the case of estates and trusts is to be computed on the same basis and in the same manner as in the case of an individual, with certain exceptions. From this it would appear that the phrase "all of the income" does not mean gross income, but something less. This almost has to be the case; otherwise the trustee would be unable to pay taxes, insurance premiums, and other customary charges and expenses incurred in the management of the trust property. But section 162 of the Code deals with income only for income tax purposes and not trust accounting purposes. It is believed that the statutory language in the new Act should be construed as synonymous with "net income" as determined by applicable State law. However, until the matter is clarified by official ruling or regulation many attorneys will be hesitant about using the phrase "net income" and will prefer to use the statutory words "all of the income" or simply, "the income." From a trust accounting point of view, the result should be the same whether the words "all of the income," or "the income," are used, for the Illinois Principal and Income Act defines income as gross income less statutory charges.

There is one word of caution. Should not the same terminology employed regarding the income of the marital fund also be used in connection with the income from the non-marital fund? To say "all of the income" in the marital provision and then to use the phrase "net income" in the residuary provisions may raise construction problems as to the testator's intentions. It would seem preferable to use the same expression in all reference

throughout the will, so that no confusion as to intention will result.

The requirement for annual or more frequent distributions of income is clear. It means, of course, that no accumulation provisions, discretionary or mandatory, will be permitted if the marital fund is to qualify for tax deduction.

Encroachment

What about an encroachment clause giving the trustee power to use a part or all of the principal of the marital fund for the benefit of the spouse? The language of paragraph (F) of the Act reads: "With no power in any other person to appoint any part of the corpus to any person other than the surviving spouse." A power in the trustee to pay sums of principal to the surviving spouse is compatible with this provision, and it is believed that an encroachment clause is fully authorized by the Act. However, care must be used to limit the scope of the encroachment clause to the surviving spouse alone. Many attorneys employ forms of encroachment clauses which embrace not only the spouse, but also children and other dependents, and such clauses as applied to marital funds will, of course, require revision. The argument has been made that as to minor children the surviving spouse has a legal obligation of support and that this circumstance ought to justify the inclusion of such children within the embrace of a marital encroachment clause. However, this would seem hazardous until an official ruling or regulation is issued sanctioning it. The only safe course is to confine to the spouse alone the encroachment clause governing the marital fund.

One further comment may be made as to the encroachment clause. Where the surviving spouse is also the beneficiary of a non-marital fund and an encroachment clause is included in the non-marital, as well as the marital, fund for the benefit of the spouse, a question may arise as to the corpus to which the trustee should first have recourse. Generally speaking, it will be desired to deplete the marital fund first. Accordingly, the draftsman should consider including an additional phrase in the encroachment clause governing the non-marital trust to the general effect that the trustee should take into consideration all other income and cash resources available to the spouse for the purpose from all sources "including the income and principal of the marital trust."

A power in the spouse to withdraw all or any part of the corpus of the marital fund on request would also appear to come within the statutory language of paragraph (F), "with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse. . .)." The Senate Committee report indicates that the term, "power to appoint" as used in the law includes any power which in substance and effect is such a power regardless of the nomenclature used in creating the power and local property law connotations. Accordingly it is believed that a power of withdrawal in the surviving spouse may safely be included in marital trust fund provisions.

Next is the question of the compatibility of the facility of payment or disability clause which gives the trustee the privilege of paying income otherwise distributable to a person under legal disability or other incapacity, in various ways, as through a legal guardian or conservator, or by the trustee itself applying the income for the use of the beneficiary. The present feeling is that such a clause is unobjectionable and will not defeat the right to an estate tax marital deduction provided that there is in such a clause no requirement or discretion in the trustee to accumulate any income not needed by the beneficiary. Any provision for accumulation of income may, as already indicated, forfeit the deduction, but a provision which directs that all income distributable to a beneficiary shall be paid out by the trustee in such one or more of the optional methods usually provided, would seem to be proper and fall within the

statutory language of the spouse being "entitled" to all of the income. However, all such clauses should be reviewed to make certain that they permit no discretion in the trustee to accumulate and perhaps also to narrow the optional methods of making distribution to the spouse directly, or to her legal representative, or by the trustee itself using such income for the benefit of the spouse.

Spendthrift Clauses

What about the use of a spendthrift clause as applied to the marital fund? The general belief at this time is that such a clause is compatible with the law and does not limit or circumscribe the exercise of the general power of appointment over corpus by the spouse "alone and in all events." Moreover, the clause does not make inapplicable the general rule as to the right of a beneficiary's executor or administrator to sums due at the beneficiary's death. Griswold, *Spendthrift Trusts* (Second Edition) page 419. However, many attorneys in this State having in mind *Cocdery* v. *The Northern Trust Company*, 321 Ill. App. 243, 53 N.E.(2) 43 (1944), may have some hesitation about the use of a spendthrift clause as applied to marital trusts. In that case, the Appellate Court held that a spendthrift clause operated to preclude the payment of income in the hands of the trustee at the death of the beneficiary to her estate, since to do so would make it available for creditors. It would seem advisable for the draftsman to scrutinize the form of spendthrift clause customarily used by him with the new law in mind. Until the effect of a spendthrift provision on the right to an estate tax marital deduction is resolved by official ruling or regulation, the draftsman may feel that this is one of the clauses which may be omitted without serious effect on the general purpose of the trust.

The same considerations and conclusions apply in regard to the so-called undistributed income clause, the effect of which is to direct that upon the death of the beneficiary any undistributed and accrued income shall be paid over as income to the next taker of income or corpus. Such a clause has the effect of sending undistributed and accrued income along with corpus to the appointee if the spouse exercises her power of appointment, or to the takers in default, if she fails to exercise the power. Section 4 of the Illinois Principal and Income Act specifically deals with the situation and many attorneys may feel that this clause could be omitted without serious effect until its use is sanctioned by official ruling or regulation, rather than to risk any possible forfeiture of an estate tax marital deduction.

A common provision in wills is one authorizing the trustee to hold several trusts or shares created under the instrument as a common fund dividing the income among the several trusts or shares proportionately. Where the balance of the estate is held in trust for the benefit of the surviving spouse, may it not be argued that such a clause is susceptible of a construction that, instead of separate trusts, it operates in effect to establish only one? If it were to have such effect, it would defeat the right to an estate tax marital deduction for the reason that the surviving spouse would not have a power of appointment over the entire corpus. Accordingly, it would appear that the use of such a provision is hazardous. On the other hand, it would not seem objectionable to include a provision authorizing the trustee to assign undivided interests in the assets of the estate to the several trusts and to make joint investments of funds.

Powers

Next to be considered are the trustee powers. Many attorneys use broad investment clauses and trustees prefer it this way. However, under a broad investment clause it is possible for a trustee to invest trust funds in assets constituting terminable interests as defined by the new law. Does such an investment power in the

trustee defeat the right to an estate tax deduction? The only provision in the law that appears to bear on the question is that of paragraph B(iii). It declares that no deduction shall be allowed with respect to a terminable interest if such interest is to be acquired for the surviving spouse "pursuant to directions of the decedent by his executor or by the trustee of a trust." A power in the trustee is not a "direction" from the decedent, and the feeling is that a power to invest moneys in terminable interests should not disqualify a marital trust for a tax deduction, unless it is evident that such an investment power is merely a subterfuge.

Most forms of trustee's powers include provisions authorizing the trustee to amortize bond premiums and discounts, and in general to determine what is income and what is principal and how all receipts and disbursements shall be credited, charged, or apportioned as between income and principal. Does this authority in the trustee jeopardize the marital deduction? The belief is that this power is probably unobjectionable and should not disqualify the trust for an estate tax marital deduction. However, attention is called to the line of cases of which *Dumaine* v. *Dumaine*, 301 Mass. 214, 16 N.E.(2d) 625 (1938), is a leading decision holding that a power in the trustee to determine what is income and what is principal does not confine the trustee to questions of doubt under local law, but permits the trustee to make determinations contrary to local law. In a jurisdiction following this line of authority, such a clause would permit the trustee to declare that which would ordinarily be income to be principal and circumvent the statutory direction that all income from the marital fund must be paid annually to the spouse. No Illinois decision on the question has been found, but it is believed that such a power in the trustee, unless carefully drafted, might jeopardize the marital deduction. Since the Illinois Principal and Income Act covers the majority of problems raised in regard to matters of income and principal, it would seem that until an official ruling or regulation is obtained covering the point, the more prudent course would be to omit such provisions from the trustee's powers.

The final point in regard to drafting wills containing trust provisions is the matter of the inclusion of a renunciation clause directing that in the event of renunciation, the will should be construed as if the spouse had predeceased the testator. Whatever hesitation there may have been heretofore about including such a clause in a will, it would now seem almost a "must." Particularly is this true where the interests passing to the spouse do not approximate the marital deduction, for by renouncing the will and taking statutory benefits, a marital deduction may be claimed to the extent of such benefits. This is an added inducement to renunciation; and since the Illinois law is such that remainder interests contingent upon the death of the life beneficiary will not be accelerated by renunciation, it becomes doubly important to provide that in case of renunciation, the will shall be read as if the spouse had predeceased the testator.

Spouse's Will

A final word remains to be said in regard to the will of the surviving spouse. All such wills should, of course, be reviewed in the light of the new law and where the will gives the entire estate to the other spouse, the remarks already made as to the use of the common disaster clause apply. In many cases the inclusion of a six-month clause will be warranted in order to avoid the imposition of additional taxes, should both spouses die within the period. The tax clause should also be carefully scrutinized particularly with reference to waiver of rights of reimbursement.

Lastly, the will should deal with any power of appointment which such spouse may have under any marital trust fund established by the other spouse. If it is desired to exercise such power, the exer-

cise should refer specifically to the power. On the other hand, if it is not desired to exercise the power, a provision should be included expressly negativing such exercise, since the Illinois law is such that under some circumstances a residuary clause may constitute an exercise of a power of appointment even though no reference to the power is made. Such a negativing of an exercise of the power may be accomplished by including in the residuary clause the words: "But expressly excluding any property over which I may now or hereafter have power of appointment."

APPLICATIONS FOR MEMBERSHIP

Each member of the Association is urged to scrutinize the following list of persons who have filed applications for membership. Ten days after the mailing of this list, the Committee on Admissions will begin the work of interviewing applicants whose names are here published. Members should deem it their duty to advise the Committee on Admissions as to the fitness or unfitness of any applicant and feel assured that the committee is always appreciative of assistance rendered. The information here furnished includes the name of the applicant, his address, date of admission to the bar and endorsers.

WILLIAM L. BLAKE, 111 W. Washington St., Ill., Feb. 14, 1929, Minn., Aug., 1925; Joseph D. Shelly, C. R. Davis.

JOSEPH W. BOYD, 141 W. Jackson Blvd., Oct. 10, 1935; Lee Soltow, John I. Mayer.

RICHARD J. BYRNE, 3175 N. Lincoln Ave., Jan. 12, 1948; Donald E. Bateman, Harry F. Polos.

OLEN R. CLEMENTS, 29 S. LaSalle St., Ill., Oct. 4, 1916, Ind., 1918, Fla., 1924, N. Y., 1933; Austin L. Wyman, Henry F. Vallely.

JOHN DONALD DEVANEY, 184 W. Lake St., Jan. 12, 1948; William V. Brooks, Charles J. Clusman.

CARL DEVOE, 231 S. LaSalle St., June 16, 1932; Arthur J. Goldberg, Abraham W. Brussell.

FRANCIS R. FITZSIMONS, 231 S. LaSalle St., Oct. 11, 1935; Gaylord A. Toft, Virgil V. Livingston.

JOHN P. FOX, JR., 120 S. LaSalle St., Jan. 12, 1948; Thomas N. Roupas, Milton A. Kolar.

CHRISTIAN A. GULBRANDSEN, 105 W. Adams St., Jan. 10, 1945; Dillon L. Ross, Jr., Glen E. Smith.

WAYNE M. HOFFMAN, 135 E. 11th Place, Dec. 8, 1947; John W. Freels, Harold E. Spencer.

ROBERT V. HOGAN, 175 W. Jackson Blvd., May 12, 1947; Irving Breakstone, Howard B. Bryant.

SAMUEL A. KAVATHAS, 134 N. LaSalle St., Jan. 12, 1948; Donald E. Bateman, A. Andrew Leone.

M. RICHARD LIPSCHULTZ, 105 W. Adams St., Jan. 12, 1948; H. Burton Schatz, Edmund A. Spencer.

NICHOLAS G. MANOS, 100 W. Monroe St., July 10, 1943; Archie Schinberg, Paul P. Preston.

FRANK H. MARKS, 135 S. LaSalle St., Ill., Oct. 13, 1927; D. C., 1926; Louis I. Shapiro, Leo N. Arnstein.

PAUL MORAN, 12000 S. Halsted St., Jan. 2, 1931; John A. Sbarbaro; Edward Hershenson.

ARTHUR MORSE, 10 S. LaSalle St., June 11, 1947; Thomas J. Purcell, Frank M. Padden.

JOHN B. MURNIGHAN, 111 W. Washington St., Jan. 12, 1948; Joseph Kamfner, Edwin A. Halligan.

JOHN C. PODLESAK, 2319 S. 59th Ave., Cicero, Ill., May 12, 1947; Harry D. Taft, William F. Clarke.

EMILE JOHN RAGO, 2531 W. Superior St., Jan. 5, 1948; Catherine M. Barbino, Alice Kolnick.

JOSEPH O. RUBINELLI, 519 W. North Avenue, Dec. 12, 1940; Thomas L. Underwood, Mario A. Palumbo.

ARTHUR R. SEDER, JR., 357 E. Chicago Ave., Jan. 12, 1948; John P. Lindgren, William L. Niemann.

ELMER F. SLOVACEK, 1328 W. 18th St., Jan. 12, 1948; E. Houston Harsha, Sheldon Teff.

EUCLID LOUIS TAYLOR, 188 W. Randolph St., Feb. 13, 1930; Henry C. Ferguson, Nat M. Kahn.

WILLIAM B. WOOD, 1 N. LaSalle St., Jan. 12, 1948; Matthew H. Schaenbaum, Walter Rojek.

PROPOSED LEGISLATION CONCERNING ILLINOIS UTILITIES

The task of drafting new legislation with respect to the regulation of public utilities in the State of Illinois was undertaken by the Committee on Public Utility Law of the Chicago Bar Association in November, 1940. Representatives from the Section on Public Utilities Law of the Illinois State Bar Association actively participated in this work. During the course thereof, drafts were made of two proposed bills. One is a draft of a proposed new Public Utilities Act, and the other a draft of a bill to amend the Civil Administrative Code to provide for a Department of Public Utilities. Both of the proposed bills have been approved by the Board of Managers of the Chicago Bar Association and by the Section on Public Utilities Law of the State Association.

The fundamental theory underlying the proposed bills is that the power to make orders, rules and regulations should not be exercised by the same persons who exercise the power to investigate and prosecute. At the present time, the Illinois Commerce Commission has power to act as prosecutor and judge. It has the duty to enforce "the provisions of the Constitution and statutes of this State affecting public utilities," as well as the power to file complaints on its own motion and to decide the controversy presented by its own complaint. The Committee concluded that, with adequate provision for judicial review, a divorcement of the power to investigate and prosecute from the other powers of the Commission was the most feasible solution of the problem, and would bring about a more enlightened and fair administration of the laws governing public utilities.

Two possible plans of divorcement were considered. One was the separation of functions within the Commission itself. The other was the creation of a Department of Public Utilities in the executive branch of the government charged with the duty of investigation and prosecution, and the lodgment of power to hear and decide matters in a wholly separate and independent agency. In view of the Importance of the public and private interests involved, the Committee finally concluded that a separation of functions in fact, as well as in theory, was essential, and that the second plan was more likely to bring about that result.

Department Bill

The salient provisions of the department bill are relatively brief. It provides for the creation of a Department of Public Utilities within the framework of the Civil Administrative Code. The Department will be directly responsible to the Governor, and the terms of office of its officials charged with the determination of matters of policy will expire with the term of the Governor.

The principal officers of the Department and their respective salaries are as follows: Director, $8,000; Assistant Director, $5,000; Chief of Accounts and Finance, $7,500; Chief of Engineering, $7,500; Chief of Rates and Tariffs, $7,500; Chief of Public Service, $6,000. The functions of the Director and Assistant Director are largely administrative, whereas those of the remaining officers are primarily technical in character. The latter officers will occupy positions substantially the same as those now held by corresponding officials in charge of the various bureaus operating under the Illinois Commerce Commission.

In general, the Department is given broad powers of investigation and prosecution similar to those now exercised by the Illinois Commerce Commission. Among other things, the Department will have authority to keep itself informed concerning the business and affairs of public utilities, to examine and inspect their books, property and service, to prescribe the form and contents of all reports to be filed by them, to institute proceedings before the Commission, and to seek judicial review of its orders and decisions. The Department will also have

power to confer with other regulatory agencies on public utility matters, and to protect the interests of the people of this State in proceedings before Federal officers and agencies concerning public utilities.

PUBLIC UTILITIES BILL

A. The Commission

The commission bill provides for the creation of a new Commission to be known as the Illinois Public Service Commission, which will consist of five commissioners, not more than three of whom may be members of the same political party. The commissioners will have an annual salary of $15,000, and ten-year terms, one expiring every odd-numbered year. These provisions, it is believed, will make the office of a commissioner attractive to able men; will insure, as far as legislation can insure, a tribunal independent of political pressure; and will provide for continuity in office of experienced men.

The Commission, under the proposed bill, will have a secretary and staff of examiners, but no rate experts, accountants or engineers. All examiners must be at least thirty years of age. In addition, they are required to be members of the Illinois Bar, or former examiners or assistant commissioners with the Illinois Commerce Commission who have had at least five years' experience in that capacity.

The Commission may also employ two assistant secretaries and, within such limits as to number as the Governor may approve, such stenographic and clerical help as may be necessary.

B. Procedural Provisions

Under the proposed bill, the Commission will not have power to institute any proceeding on its own motion. All proceedings must be initiated by a petition, which may be either a complaint for relief from a violation of the Act, or an application for other relief such as an application by a utility for authority to issue securities. A petition instituting a proceeding may be filed by the Department, or by any person, corporation, association, municipality, public officer or public agency.

The Commission is required under th proposed bill to deliver a copy of ever petition and tariff schedule filed with to the Department. In this manner th Department, as the representative of th whole public, will be kept informed o any proposal laid before the Commission

The proposed bill requires a hearing, o an opportunity for hearing, as a condi tion precedent to the exercise by th Commission of practically all of its reg ulatory powers. In addition, the Com mission may set any petition for hearin whenever it deems a hearing necessary Notice of all hearings must be given t the parties and to the Department. I the case relates to rates or service of utility within any municipality, notic must also be given to such municipality

The Commission is required to serve copy of all orders entered by it upo every party to the proceeding, upon al utilities bound thereby, and upon the De partment. Notice of all final order must be posted in the office of the Com mission and a copy thereof made avail able for public inspection. All fina orders must be supported by findings con cerning the subject matter and facts in quired into by the Commission.

No provision is made in the propose bill for petitions for rehearing before th Commission as is now required under th present Public Utilities Act. Instead, i provides that any party may file a peti tion for modification or vacation of an final order or decision of the Commis sion. The filing of such a petition is no required as a condition precedent to judi cial review of any final order or decisio of the Commission, but the denial there of is subject to judicial review.

Under the proposed bill, the Commis sion will have authority to grant declara tory relief. An order granting such re lief may be entered by the Commission upon petition and after opportunity fo hearing, whenever there is any contro versy or uncertainty with respect to an matter within its jurisdiction or an orde or decision of the Commission. It is be lieved that this provision, which i modeled after a similar provision in th new Federal Administrative Procedur

Act, will provide a desirable type of relief not now available under the present Public Utilities Act.

The provisions for judicial review contained in the proposed bill are somewhat broader than those found in the present Public Utilities Act. The validity of the order or decision under review must be determined on the record before the Commission, except that evidence may be presented to show (a) that the record as certified by the Commission is not a true or complete transcript of the proceedings before the Commission, (b) that the Commission failed to grant a fair and impartial hearing, and (c) that the order or decision under review has been modified or vacated by the Commission. The hearing and determination of the cause will extend to all questions of law and fact presented by the record before the court.

C. Rate Making Functions

1. Suspension of Rates

Under the present Public Utilities Act, the Commission may suspend a proposed schedule, either upon complaint or upon its own initiative without complaint, pending a hearing and decision on the merits. No showing of any kind is required, and there is no standard to control the discretion of the Commission in the exercise of its power of suspension. This situation makes it possible for the power of suspension to be exercised arbitrarily.

The proposed bill does not permit the Commission to suspend a new rate schedule on its own motion. The Commission may suspend only if it finds that there is good cause to believe that the proposed schedule would be unlawful. It may act only upon a verified petition which may be supported by accompanying affidavits. The utility is given the right to file a verified answer which may be supported by accompanying affidavits.

The proposed bill contains a further provision to meet the situation presented where a utility is seeking an increase in rates which it believes to be justified, but which the Commission, on the verified pleadings before it, finds should be suspended. In such cases, the utility may put the new schedule into effect, notwithstanding a suspension, by filing notice of its election so to do with the Commission and depositing thereafter in a bank all amounts collected by it during the period of suspension in excess of the rates theretofore in effect. The Commission is authorized to permit the utility to file a bond in lieu of making such deposits. In the event it is finally determined that the increased rates charged by the utility during the period of suspension, or any part thereof, were unlawful, the excess must be refunded by the utility. If the utility fails or refuses to make the refund, any party entitled to such refund may sue therefor in any court of competent jurisdiction.

This impounding procedure is provided for in the Uniform Public Utilities Act which was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. The procedure protects the customers; affords a means by which a utility willing to undertake the burden involved can protect its interests; and is designed to obviate, insofar as possible, the present practice of resorting to a court of equity for injunctive relief.

2. Temporary Rates

The present Public Utilities Act gives the Commission power to prescribe a temporary schedule of rates for a period not exceeding one year. Such rates may be prescribed if the Commission finds that the net income of the utility, after reasonable deduction for depreciation and other necessary reserves, is in excess of the amount required for a reasonable return upon the value of its property, and that a hearing to determine the issues involved in a final determination of rates will take more than 120 days. The Act also provides that if, upon final disposition of the issues, the rates finally determined are in excess of those prescribed in the temporary order, the utility shall be permitted to recoup its loss by means of a temporary rate increase for a reasonable period of time.

This method of allowing the utility to recoup a loss in the event it is finally de-

termined that the rates in the temporary schedule were insufficient is both impractical and illusory. There is no way in which the utility can compel the Commission to grant a temporary increase in rates. Nor has the utility any assurance of recoupment even though the Commission is willing to act. It is entirely possible that the temporary rates imposed by the Commission may have been confiscatory when ordered into effect, but at the time of final decision a year or several years later they may be reasonable. In such a situation, the utility is unable to recover its loss, because the Act merely provides for recovery of the difference between the revenue produced by the rates finally determined for the future and the revenue which would have been realized during the period of the temporary order if the rates prescribed for the future had been charged during that period.

Under the proposed bill, the Commission has power, after a preliminary hearing on petition, to establish a temporary schedule of rates whenever it finds that a public utility is earning more than a fair and reasonable return, and that a full hearing to determine the issues involved will require more than 120 days. In such cases, the Commission may enter an order fixing a temporary schedule of rates for a period not exceeding one year. If the public utility deems the temporary order unwarranted or too drastic, it may, notwithstanding the order fixing a temporary schedule, continue in effect its existing rates by following an impounding procedure substantially the same as that provided for in the case of rates continued in effect notwithstanding an order of suspension.

After full hearing, the Commission is required not only to fix rates for the future, but also to determine whether the rates continued in effect by the public utility during the period covered by the temporary order are lawful or unlawful. If the Commission finds that the rates were unlawful during that period, or any part thereof, it must determine the rates which would have been lawful. If it is finally determined that the rates charged during the period covered by the temporary rate order were unlawful, either for the whole period or a part thereof, the utility is required to make a refund under procedure similar to that provided for in suspension cases.

3. Rate Standards

The present Public Utilities Act contains no standard other than that of "just and reasonable" to govern the Commission in the exercise of its power over the measure of rates. The proposed bill contains a so-called rate-making rule which is modeled upon the one in the Interstate Commerce Act. The proposed rule reads as follows:

> The Commission, in the exercise of its powers under this Act to determine just and reasonable rates for public utilities, shall give due regard to the public need for adequate, efficient and reasonable service; to the effect of any existing or proposed order of the Commission upon the demand of the public for such service; and to the need of the public utility, under honest, economical and efficient management, for revenue sufficient to enable it to meet the cost of furnishing such service and to earn a fair and reasonable return upon the fair value of its utility property, or, in case of any public utility which has elected to have its rates based on the cost of its utility property as provided for in this Act, a fair and reasonable return upon such cost. In determining the proper amount of such return, the Commission shall give due consideration to the need of the public utility to attract the necessary capital for the proper continuation and expansion of its public utility business.

The efficacy of a rate-making rule depends primarily upon the consciences of the men who administer it, but it is believed that a Commission of competent and high minded members, such as the proposed bill contemplates, will give at least some heed to a rule of that character. The broad scope of judicial review presently available under the decisions of the Supreme Court of this State — the breadth of which the Committee has not attempted to restrict — will probably enable the courts to afford relief in cases where the rule has been arbitrarily disregarded to the prejudice of either the public or the utility.

Under the foregoing rule, the rate base upon which a utility is entitled to earn a

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fair and reasonable return is the fair value of its utility property, unless it has elected to have its rates based upon the cost of such property. In the event of such election, it is entitled to a fair and reasonable return upon such cost. The term "fair value" is now well known in the field of public utility regulation and has been defined in numerous court decisions. It has also been sanctioned and applied by the courts of this State in passing upon the validity of utility rates prescribed by the Commission.

The inclusion of a "cost rate base" in the proposed bill represents an endeavor by the Committee to give some recognition to the growing trend among regulatory agencies in other jurisdictions to establish rates upon original cost. In many cases, however, the use of original cost—sometimes referred to as "aboriginal cost"—is grossly unfair to the utility. The cost rate base adopted in the proposed bill seeks to overcome this difficulty.

The proposed bill provides that any public utility may adopt the original cost of its utility property, as determined by the Commission after a hearing upon petition, as the original cost of such property for rate-making purposes. In the event of such election, the utility is entitled to earn a fair and reasonable return upon an amount designated as the "cost rate base." It consists of the original cost of the utility property as determined by the Commission, after (a) appropriate allowance for working capital and for the actual cost of any additions to such property since such determination, and (b) appropriate deduction of the original cost of that portion of such property and the actual cost of that portion of any additions thereto which have ceased since such determination to be used or useful in rendering service to the public. Actual cost as applied to utility property is defined as the amount actually paid or given for such property by the utility, but does not include any amount in excess of that which would have been reasonably paid or given in an arm's length transaction.

In substance, the cost rate base represents a compromise between the original cost theory and what is sometimes referred to as the "prudent investment" theory. It combines the element of stability inherent in the use of original cost, and the element of flexibility and fairness incident to the use of prudent investment. Once a utility has elected to adopt a cost rate base, its rates are governed thereby in all subsequent rate proceedings. As a result, the consuming public is protected against improvident acquisitions of utility property and fluctuations in the level of prices, and the utility is assured of a stable rate base, which does not change with each political administration and economic cycle depending upon the exigencies of the moment.

As a further safeguard against the possibility of arbitrary action on the part of the Commission in prescribing rates for any utility which has adopted the cost rate base, the proposed bill provides that no deduction is to be made from such cost rate base for existing or accrued depreciation or amortization. In lieu thereof, the Commission is required to make a deduction from the operating expenses of such utility in an amount equivalent to interest, at a prescribed rate, on the amount then remaining in its depreciation or amortization reserve. A similar provision has recently been adopted by the public utility regulatory bodies in Missouri and Louisiana following a statewide investigation of depreciation rates and practices.

D. Indeterminate Permits

To meet the constantly recurring problem presented by the termination of short-term franchises under which many utilities operate in this State, the proposed bill provides for the issuance of indeterminate permits. Any public utility, other than a railroad or street railroad, operating under an existing franchise may file with the Commission a written declaration surrendering such franchise and re-

ceive in lieu thereof an indeterminate permit. Such permits are now provided for in the public utility laws of various states and in the Uniform Public Utility Act. In outlining the need for indeterminate permits, the drafting committee which prepared the Uniform Public Utility Act made the following statement:

> Franchises limited to short terms of years are illogical. They are unsatisfactory to utilities, investors, and consumers alike. Investments in enterprises which are limited in years of existence should be amortized in such a fashion as to return the money invested at the end of the period. Yet rates must not exceed the amount necessary to yield a fair return on the value of the utility property and they cannot be large enough to amortize the investment. Furthermore, there is no economic reason for amortizing the investment. The plant cannot be scrapped at the end of the franchise period. The public must still be served. So grantees of franchises and utility investors are forced to trust to their ability to secure renewals of the franchise at the ends of the periods. The political manipulation that attends the termination of franchises and the efforts to secure new ones, is familiar to all who have been concerned with local politics.

The proposed bill contains a further provision to alleviate any hardship which might result from the sudden termination of all franchises, and the various fees now being paid thereunder. It provides that any municipality may file a petition with the Commission requesting a determination of the amount of compensation to be paid by an utility which was obligated to make such payment under its surrendered franchise. In fixing the amount of such compensation, if any, the Commission is required to give due consideration to any expenses to such municipality by reason of the use and occupation of its public highways by the utility, and to the ability of the utility under just and reasonable rates to earn a fair and reasonable return.

E. Security Issues

A function of outstanding importance now vested in the Illinois Commerce Commission is jurisdiction over the issuance of securities by utilities. The present Public Utilities Act provides that securities issued without authority of the Commission shall be void and also provides that any security "issued with the authorization of the Commission, but not conforming in its provisions to the provisions, if any, which it is required by the order of authorization of the Commission to contain, shall be void."

Although the primary purpose of these statutory provisions is to protect the utilities — and ultimately the public served by them — against improvident issues of securities, the protection is obtained at the expense of innocent purchasers and is contrary to the philosophy of the Negotiable Instrument Law.

The proposed bill expressly provides that securities issued without the approval of the Commission shall not be void, but the public utility is subjected to liability for a fine in an amount equal to ten per cent of the amount of the issue. The court is given no discretion but must fix the penalty at ten per cent. This, it is believed, will remove any temptation on the part of the management of a utility to engage in financing without the approval of the Commission, and will give innocent purchasers the protection which it seems fair they should have.

Broadly speaking, the regulatory powers of the Commission in those portions of the proposed bill which have not been considered specifically are substantially the same as those in the present Public Utilities Act. An effort has been made, however, to improve the draftsmanship by eliminating unnecessary language, duplications and conflicting provisions, and to clarify provisions whose meaning is obscure or ambiguous. Provision has also been made for the repeal of obsolete and conflicting statutory provisions. The fundamental theory that the Commission should not have the power to investigate or the power to institute proceedings on its own motion is, however, strictly observed.

It is the belief of the Committee that the proposed bills outlined above are sound in theory and fair to both the utilities and the public.

CHICAGO BAR ASSOCIATION GLEE CLUB

"The man that hath no music in himself
Nor is not moved with concord of sweet sounds,
Is fit for treasons, stratagems, and spoils."

So many inquiries have been made as to the personnel of the Chicago Bar Association Glee Club and how it functions that the Committee on Entertainment requested that the accompanying picture and this historical sketch of the Glee Club be printed in the BAR RECORD.

The first time that the Glee Club attempted to sing its own lyrics directed to the guests of honor, and probably its first appearance, was at a dinner given by the Illinois State Bar Association to the Judges of the Supreme Court of Illinois on November 29, 1918. Almost all of the chorus were members of the Chicago Bar Association. John D. Black was leader that night and continued as leader for some time. The lyrics sung that night stand up to date as the following excerpt shows:

TREAT HIS HONOR KINDLY

Oh, treat his honor kindly
And show him due respect.
For after all he's just a judge,
So what can you expect?
And though to-night our vein is light,
The verdict we direct,
That the bar will always claim him as
a brother.

The next year a repeat performance was requested and the Glee Club again added to the gayety of the occasion with another lyric directed to the judges in which the songsters ribbed them about their easy life.

You Judges lead an easy life
You're free from every care and strife
You have no income tax nor rent to pay
Your job is pretty soft, I'll say.

By 1922 the Glee Club had become a definite part of the Chicago Bar Association dinners given in honor of dignitaries of the bar, bench and public life. Ever since that time the chorus sang to, and with, Judges, Plenipotentiaries, domestic and foreign, visiting firemen, professors and sometimes our own members.

By 1925 the Glee Club had become so popular that it decided to branch out into theatricals. In that year the first "Christmas Spirits" show was given on December 17. It was called "A Yuletide Shift in One Seance." The scene was a court room presided over by Judge Russell Whipman, then the President of the Association. The defendant was charged with defrauding complainants by some spiritual seances. The jury disagreed because the spirits were "too Volstead dry."

From that year to the present time "Christmas Spirits" shows have been an annual event, growing into a four night performance in order to accommodate the public demand. The Glee Club, now become the CBA Chorus, is the backbone of the show, mainly because it rehearses every Monday noon for an hour getting the music and histrionics in shape so that the members can be ready to help make any Association function a success. John Black is still on deck and acts as leader emeritus. His vitality, interest and suggestions have been an inspiration each year to the success of the chorus. For several years it has been under the direction of Edwin R. Ekersall who is doing a magnificent job.

Members in the picture are:

1st row: Rademacher, Parkhill, Ekersall, Black, Holloway, Stevenson and Byron.

2nd row: Davis, Swanson, LaPlante, Mahon, Yelvington, Barnard, Wright and Finks.

3rd row: Peterson, Burks, Schwab, Zimmerman, Reichelderfer, Spangenberg, Booth and Owens.

4th row: von Ammon, Hillier, Hennessey, McDermand, Chambers and Dice.

PROPERTY LAW STILL HAS TAX CONSEQUENCES - I

By Dixie M. Snively

The Federal Estate Tax Cases

It is easy to become obsessed with a subject which is as abstruse as future interests, but it is also too easily forgotten that most of law is a matter of expression, and I refer you to Judge Learned Hand's dissenting opinion in *Commissioner v. City Bank Farmers' Trust Company*,[1] where speaking, incidentally of the distinction for tax purposes between vested and contingent remainders, the judge says, "I am quite aware that this is all largely a matter of words, but so is much of the law of property, and unless we treat such formal distinction as real, that law will melt away and leave not a rack behind."[2]

It is easy to over-emphasize statements such as those made by Judge Hand, but it is also easy to forget that the entire law of taxation, both income taxation and estate taxation, is founded on the basis of taking property away from people, perhaps with due process, but at least taking away from them. And of recent years there has developed in the field of taxation, as has often been the case in other professional fields, a fad. That fad is to ignore all property concepts in dealing with income tax problems and estate tax problems. It is a tendency which was given impetus first by Mr. Justice Sutherland, by his protestations in *Klein v. United States*,[3] where he says that, "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing, of the law of vested and contingent remainders."[4]

You will probably recall that the Court there held taxable as a gift intended to take effect in possession or enjoyment at or after death a gift in which the settlor had expressly reserved to herself a reversion in certain property which had been conveyed prior to her death.

The same judge who said that nothing was to be gained by multiplying the niceties of the arts of conveyance in *Klein v. United States*, in speaking a few years later for a divided court in *Helvering v. St. Louis Union Trust Company*,[5] held that the gift there considered was not to be regarded as a part of the decedent's gross estate, though it was contended that it was to take effect in possession or enjoyment only after death, because in that case the interest which had been reserved by the settlor was in the nature of a possibility of reverter, and was contingent upon the settlor outliving the life beneficiary.

The fact of the matter is that [illegible] these were niceties of conveyancing [illegible] the time that the settlor died from the standpoint of the value of the two interests [illegible]. And from that point of view, it is perfectly clear that the niceties of the art of conveyancing are unimportant, or should be unimportant, for estate tax purposes.

Nevertheless, in *Becker v. St. Louis Union Trust Company*,[6] decided the same day, *Helvering v. St. Louis Union Trust Company* was followed, and it was not until *Helvering v. Hallock*,[7] which we have all read and which has been the subject of as much discussion as any estate tax case that we know, that the Court decided to go back upon the rule of following the *St. Louis Union* [illegible] cases.

1 74 F. 2d 242 (C. C. A. 2d 1934)
2 Id. at 247
3 283 U.S. 231 (1931)
4 Id. at 234
5 296 U.S. 39 (1935)
6 296 U.S. 48 (1935)
7 308 U.S. 106 (1939)

Scope of the *Hallock* Case

Hallock gives the Court [illegible] not only *Hallock* [illegible] *Estate of Lucas v. Earl, Union Trust* [illegible] and the opinion was written by Mr. Justice Frankfurter. I suppose many of you have read that opinion carefully. It is full of stabs at the lawyer's property. If you read that opinion, and if you were to read no other tax case, you would be convinced that the law of property had no function whatever so far as determining the taxability of a given transfer is concerned or so far as any tax problems is concerned.

The Justice speaks contemptuously of the "recondite learning on property law." He says that the law is "full of casuistries." He refers to "subtle [illegible] which [illegible] possess no relevance for tax purposes," and he also speaks of the "[illegible]ivity fivesticks" of the law of property, and he states that these are peculiarly irrelevant in the application of tax statutes. He talks of "gossamer distinctions," and he mentions "the [illegible]osities of the [illegible] feudal law," and the whole import of the opinion is to the effect that no property law should be of any consequence in determining the taxability or non-taxability for estate tax purposes of a transfer which occurred prior to a decedent's death.

That is all very well. But it is dangerous doctrine because it has misled not only lawyers for the Bureau of Internal Revenue, but it has likewise misled a good many practitioners who are concerned with [illegible] and their taxability as a part of the gross estate of a decedent. [illegible] still a good many cases [illegible] without reference to local property law, and I don't [illegible]

[illegible] A. Randolph Pool, *Life Estates and Gift Powers* [illegible] noted to *Helvering v. Hallock*, [illegible] will find in the supplement to Mr. Pool's work, which appeared in 1946, [illegible] thirty or forty pages devoted to the many Tax Court cases which have been decided and which have attempted to interpret the implications of the *Hallock* decision. But I want to call your attention to one or two aspects of the case.

Notice in the *Hallock* case that the section of the Revenue Act which was involved was that which requires inclusion in the gross estate of a decedent of property transferred prior to his death where the gift is "intended to take effect in possession or enjoyment at or after death." Those were the words of the statute. You might argue that if property were given to A for life with the remainder to B, we will call it a remainder though it might be an executory interest, and where the gift specifically provided that the gift over was not to take effect in possession until five years after the death or until his death, or until ten years after his death, that that would be from the standpoint of the relevant section by the Internal Revenue Code, to say which was in fact "intended to take effect in possession or enjoyment at or after death."

But in a case of this kind, where the life estate which is created is vested immediately in possession or enjoyment upon the taking effect of the settlement, [illegible]

circumstance of any kind, by any stretch of the imagination, can the property revert to the settlor except possibly by inheritance from the beneficiary—that such a tax would be offensive to the Constitution, because it would be in the nature of an unapportioned direct tax.

That is ancient learning from the standpoint of tax law, but I call your attention in that connection to the court's opinion in the Second Circuit, in *Freeze* v. *Bowers*,[15] where that view is expounded at considerable length, and where, again, Learned Hand in a specially concurring opinion, demonstrates as clearly as could be done the effect of a tax of that kind from a constitutional standpoint.

Be that as it may, whether such a tax is a direct tax, or for whatever reason it may be held not to be permissible in connection with the type of gift which I have mentioned to you, the Court, in *Shukert* v. *Allen*,[16] speaking through Mr. Justice Holmes, held, where property had been trusteed by a decedent in 1921, at a time when the decedent was fifty-six years old, where the property was not to be distributed until 1951 and where the income was directed to be accumulated for the settlor's three named children and to be distributed, together with the corpus of the trust in 1951, that the property was not transferred as a gift intended to take effect in possession or enjoyment at or after death. But Mr. Justice Holmes expressly recognizes in the course of his opinion, that if the settlor thought about it at all, he certainly was pretty sure that he would be dead by the time the corpus was to be distributed.

Shukert v. *Allen* should be aligned with *Reinecke* v. *The Northern Trust Company*,[17] where five of the trusts involved were held not taxable as a part of the beneficiary's gross estate by a unanimous court writing through Mr. Justice Stone. In that case, life estates were given to certain beneficiaries, and the property was to be distributable not until, at the earliest, five years after the decedent's death.

There we have a case falling squarely within the actual provision of the relevant section of the Revenue Code, although that gift was in fact without question intended to take effect after the decedent's death; the Court held that it would not be taxable as a part of the decedent's estate.

I am reviewing those cases very briefly simply to establish the fact that merely because property is trusteed upon terms where future interests will not take effect in possession until the death of the settlor, or until after his death, the Court has never taken the position that property so trusteed, unless there is some possibility of reverter or residual interest left in the settlor, is taxable as a part of his gross estate. And so far as these residual interests are concerned, it seems clear enough from *Shukert* v. *Allen* and from *Reinecke* v. *The Northern Trust Company*, that they must be interests which arise out of the instrument of gift itself, or which are undisposed of by the instrument of the gift, so that they may come back to the settlor as a result of the failure of the trust, for one reason or another, and not because the settlor may by some remote chance inherit the interests back under the descent statutes from the beneficiary of the trust.

Commissioner v. *Spiegel's Estate*

There is no case prior to the decision of the Seventh Circuit in *Commissioner* v. *Spiegel's Estate*[18] which takes a position so extreme as that to which I have referred. I am going to spend some considerable time on the *Spiegel* case, because it is illustrative of the problem here considered, and also because it is important to Illinois lawyers, because it purports to tell you what the Illinois law is.

In the *Spiegel* case, the settlor had created property during his lifetime

15. 75 F. 2d 625 (C.C.A. 2d 1926).
16. 273 U.S. 545 (1927).
17. 278 U.S. 339 (1929).
18. 159 F. 2d 257 (C.C.A. 7th 1947).

following terms, and I will read to you from the instrument of the gift:

"I, the Trustees and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom" and shall during my life "divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of each of my three (3) children," (naming them) "such income to be distributed at convenient intervals each year. In the event that any of my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled, shall go to the child or children of such deceased child of mine in equal parts, and if there be no such child or children . . . such income shall be divided equally among" my surviving children.

He goes on to say: "Upon my death the said Trustees . . . shall divide" the trusteed estate, "and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children and the descendants of any deceased child of mine per stirpes and not per capita."

In other terms a gift of the income from the trusteed property to the settlor's children for life, with a substitutionary gift of the income to the issue of any children who die leaving children during the term of the trust, and if any die without leaving children, his share of the income shall go to the survivors. Then follows the gift of the corpus to vest at the death of the settlor as a gift to the settlor's three named children, and in case any of them have died leaving children, to such children, and if any of them have died without children, it is to go to the remaining ones who are living at the settlor's death. It is a relatively simple gift, though it may not sound so from reading it rapidly.

The only real issue in the case was whether the property which was trusteed could return to the settlor by reason of his having failed to dispose of the property wholly or by the terms of the trust instrument. The second possibility can be wholly eliminated, because it is clear from the gift that there is no provision of any kind providing for the return of the property to settlor under any circumstances whatever. So, in order that the tax might properly be exacted, it would have to be held there was some possibility of reverter, some resulting trust, or some other residual interest remaining outstanding in the settlor at the time the gift was made, and that it could return to him upon the ending of all the contingencies prior to his own decease.

"I think that I can show you that under the Illinois property decisions the property could not return to the settlor under any circumstances, and that as a result, the holding of the court, reversing the Tax Court, to the effect that the estate tax had properly been assessed, was, I think, an erroneous holding.

I want to read one or two remarks from the Court's decision. The court states, after referring to the *Klein* case and to *Helvering* v. *Hallock*, that, "Applying this law to the instant case, we think it follows that the interests under this trust did not vest upon the execution of the trust, as contended by the taxpayer, and could only vest upon the happening of the condition precedent, namely, that the beneficiaries or some of them survive the settlor, and this was the event which brought the interests into being for the beneficiaries. If none of the beneficiaries sur-

vived the settlor, and that was a possibility, then the trust failed, and the trustees would hold the bare, naked title to the corpus as trustees for the settlor.[19]

The court arresting its decision on the possibility that somehow under the terms of this instrument the property could return to the settlor. That depends, as I have said, on the applicable local property law, and I think it can be best illustrated by reference to some of the early English decisions.

The issue in this case was whether these gifts over—whether the actual taking effect in possession of these gifts over—for which provision was made in this trust instrument—was a part of the contingency upon which the interests of the beneficiaries of this trust were to be or not to be divested.

Relevant Property Decisions

I think I can best illustrate it by reference to the famous Irish case, *O'Mahoney v. Burdett*.[20] That case is simplified to its bare bones as follows: To *A* for life, remainder to *B*, and if *B* should die unmarried or without children, then the property bequeathed was to go to *C*. *B* married and dies without children, and meanwhile, *C*, who is to take the gift over, has predeceased the testator, and the gift has lapsed. One of the issues in the case is whether, since the property was to go over to *C* upon the death of *B* unmarried or without children, *B's* interest was divested, the gift to *C* having lapsed. Does it go to *B's* husband as her personal representative, or does it pass under the residuary clause of the will?

In other words, is it necessary for the gift over from *B* to *C* actually to take effect, in order that *B's* interest shall be divested? Or is it enough that there is a divesting contingency, namely, the death of *B* without children, which has in fact occurred, but which cannot throw the property over to the person who is named to take it, because that person has predeceased the testator?

In that case the court held that *B's* interest was divested, even though *C*, who was to take it upon the happening of the divesting contingency, was dead and wasn't there to take it.

But the *O'Mahoney* case is not consistent with a good many of the other English cases; it is not consistent with the majority of American decisions, and it is wholly inconsistent with the Illinois cases which have passed upon the same problem. I will mention to you, without going into detail, the English authorities on the point. The best known is *Doe d. Bowden v. Eyre*,[21] Elsewhere also *Robinson v. Wood*,[22] *Hayes v. Hurst*,[23] and the latest case is *Re Bold*,[24] decided in 1926. All of those cases follow the same view which was taken in the *O'Mahoney* case, namely, that the taking effect of the gift over is not a part of the divesting contingency. In other words, if the contingency upon which the property is to go over has occurred, under the authorities which I have mentioned, it makes no difference at all whether the gift over can actually take effect, and the prior gift does not become absolute because of the failure of the gift over to take effect.

On the other side are several also well known English cases; *Harrison v. Foreman*,[25] *Jackson v. Noble*,[26] and *Jones v. Davies*,[27] decided by Sir George Jessel when he was Master of the Rolls. There have been attempts among the English authorities to distinguish these conflicting lines of authority on the basis that the reason for the failure of the gift over may make a difference as to whether or not the prior gift should become absolute or should fail. Those distinctions, for the most part, in my opinion have been un-

19 Id. at 259.
20 L.R. 7 Eng. & Ir. App. Cas. 388 (1874).
21 5 C.B. 718, 136 Eng. Repr. 1058 (1848).
22 27 L.J. Ch. (N.S.) 726 (1858).
23 51 L.J. Ch. (N.S.) 729 (1882).
24 95 L.J. Ch. (N.S.) 201 (1926).
25 5 Ves. J. 207, 31 Eng. Repr. 549 (1800).
26 2 Keen 590, 48 Eng. Repr. 765 (1838).
27 28 W.R. 455 (1880).

1857 - 1948

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successful. I do not belive that you can reconcile the conflicting English decisions on any rational basis, and I might refer to Mr. Jarman's statement, since he states it about as succinctly as it is possible to state it: "As a devise expressly made to take effect on a contingency will not arise unless such contingency happen, it follows *a fortiori* that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen. . . . Thus, if a devise be made to A, to be divested on a given event in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto."[28]

I want to relate those principles, if they may be called that, to the *Spiegel* case. Remember the gift in the *Spiegel* case, and we are concerned not with the gift of income, but with the gift of the corpus. The gift of the corpus was to the settlor's three named children, and if any of them should die leaving a child or children, the property was to go to such child or children. Now, let us suppose that one of them died, leaving a child or children. That child or children would take, immediately upon the death of the deceased child, a vested interest in the corpus of the trust, and that interest could never be taken away from it, whether the settlor lived or died, or whether it predeceased the settlor or overlived him.

The next question, then, is the effect of the second gift over, that if any of the children die without leaving a child or children, the corpus is to go to the remaining child or children. And the notion which the court seems to entertain is if the first child—we will call them *A*, *B*, and *C*—if *A* should die during the lifetime of the settlor without leaving a child or children, and then the second child should die under the same circumstances, and then the third child, that the divesting contingency, namely, the death of the child without leaving a child or children would have occurred and since there was nobody to take the property at the death of the settlor, it would result back to the settlor.

Status of the Illinois Decisions

The Illinois cases do not support that position. The fact is, that if the child *A* died without leaving a child or children and then *B*, and then *C*, under similar circumstances, and there was nobody to take the corpus, under our cases, the corpus would not have been divested, because the gift over could never take effect. That is to say that the taking effect of the gift over, under the Illinois decisions is actually a part of the divesting contingency and if events occur so that the gift over can't take effect, the prior gift will not be divested. I can illustrate that best by reference to some of the Illinois decisions on the point. I refer first to *Knight* v. *Pottgieser*,[29] where Pottgieser had devised to his well-beloved wife Barbara for life followed by a gift in remainder to his children or their descendants in equal shares the descendant or descendants of a deceased child to take the parent's share. Notice it is a gift to *A* for life, remainder to the testator's children, or the descendants of any deceased child of the testator.

The testator's son died after he died but before the widow. He died intestate and he left no descendants, and his widow—not the testator's widow—claimed a half of the property by descent, and the other children claimed that the remainder of the children of the testator was contingent on survivorship of the life estate and if not, that it was vested to be divested by the death of any child, whether with or without descendants prior to the death of the tenant for life.

The court held for the widow of the deceased son, and in so holding, it went further than it had to. It said that the gift

28 2 Jarman, Wills (7th ed., 1930) 1339-1340.

29 176 Ill. 368, 52 N.E. 934 (1898).

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in remainder was indefeasibly vested at the death of the testator, and so the case cannot be regarded in and of itself as authority on the point now being discussed. But in two subsequent cases, *Warrington* v. *Chester*,[30] and *Smith* v. *Shephard*,[31] *Knight* v. *Pottgieser* was interpreted by the court, and in those cases the court said that the Knight case went further than was necessary for a decision of the particular issues there involved; that the remainder was one which was vested at the death of the testator to be divested by the death of any of the children, but only to be divested should a child die leaving descendants. So that upon a gift to A for life, remainder to his children, and in case of the death of any, then to the descendants of a deceased child, the remainder is vested, and it makes no difference so far as the vesting of the remainder is concerned if the remainderman dies before the life tenant provided that he doesn't leave descendants surviving him. If he leaves descendants surviving him, the remainder is divested and goes to those descendants; but if he leaves nobody to take it, then the gift becomes absolute, and that is the issue in the *Spiegel* case.

Go back again to the gift in the *Spiegel* case; the income to the children for life, and upon the death of the settlor, then the corpus to be divided between the three children, naming them, and if one of them dies leaving children, then to such children, and if one dies without children, then to the remaining children of the settlor. On the basis of *Knight* v. *Pottgieser*, as interpreted by the two later cases, if there are no survivors to take the gift, the prior gift cannot be divested, and it passes to the heirs or the next of kin of the primary beneficiaries.

In that connection, the Seventh Circuit totally ignores *Continental Bank* v. *Kane*,[32] and I want to read you the terms of the gift there. The gift there was a residuary gift of property trusteed by a prior clause of the will, which provided for the payment of certain annuities to certain named beneficiaries, and upon the death of the last surviving annuitant, the property which was trusteed was to be divided in specified proportions among five named persons, and in case of the death of any of those persons prior to the ending of the trust, the property trusteed was to be divided among the survivor or survivors.

All of these people predeceased the ending of the trust, and it was contended on the one hand by the trustee that the property became intestate, that the divesting contingency had occurred, because they had died before the trust ended, and it was contended by the next of kin of these beneficiaries on the other hand, that the divesting contingency had not occurred and could not occur, because there was nobody there to take the property, and that it passed to them as the next of kin of the beneficiaries. And the court held against the trustee, and for the next of kin of the beneficiaries, and it states without equivocation that the contingency "which would divest the interest . . . has not *and cannot happen* . . . ."[33] and it could not happen because there was nobody there to take it.

And that is the position which is taken in the Illinois cases, and for that reason, I feel satisfied that in a case like the *Spiegel* case there was no residual interest which could ever go back to the settlor of the trust. There being no residual interest which could go back to the settlor of the trust in that case, if you relate the *Kane* case to the *Spiegel* case, you will see that if, as the court says, all of the beneficiaries including the descendants of the primary beneficiaries, should predecease the settlor, that the property could not go back to the settlor simply because there was nobody to take it under the terms of the trust. The original interests of those beneficiaries were vested, the divesting contingency has not occurred because the gifts over could

30 294 Ill 524, 128 N E 549 (1920)
31 370 Ill 491, 19 N E 2d 368 (1939)
32 308 Ill App 110, 31 N E 2d 351 (1941)

33 308 Ill App at 124, 31 N E 2d at 357 (italics supplied)

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take effect, and consequently, as in the *Kane* case, the property would have descended to the next of kin of the three children or their descendants, as the case might be, depending upon who were the beneficiaries at the time that the trust ended.

Conclusions

I want to call your attention in that connection, to two or three portions of the opinion in *Commissioner v. Spiegel's Estate* which demonstrate that the court was of the opinion that these interests could result back to the settlor, and that the court was not taking the position that the mere fact that the settlor might happen to be the next of kin of one of the beneficiaries at the time that he died, would justify the exaction of the tax. The court says that, "If all of the beneficiaries of the settlor were dead at the time the settlor dies, and that was a possibility, the trust would fail."[34]

Well, it wouldn't fail under *Continental Bank v. Kane* nor under the other cases, because the interests of those beneficiaries would go to their next of kin, and not back to the settlor. The court goes on and says, "Thus there was a property interest remaining in the settlor that was terminated only by his death, and this was a sufficient interest for the estate tax to attach, pursuant to Section 811 (c)."[35] There was no property interest.

The court then says that, "In the instant case the condition upon which the beneficiaries take the corpus is that they survive the settlor."[36] They don't have to survive the settlor, except in so far as the interest might be divested in favor of their own descendants, but only to that extent, and if it was divested in favor of their own descendants, those descendants would take vested interests.

There are a couple of other remarks in the opinion: "This possibility that the property might return to the settlor was sufficient upon which to fasten the estate provisions. That the property might ret to the settlor by the operation of law rat than by the terms of the instrument, is no significance."[37]

Let us concede that it is of no sign cance that it might return by operat of law rather than by the terms of instrument. The cases from Illinois, property cases, demonstrate conclusively think, that the property could not ret either by the terms of the instrument or operation of law. The only way that could return to the settlor was by vir of the possibility that he might at the de of all of the beneficiaries, inherit fr them under the laws of intestate succes a thing which he might do just as ea if he gave the property directly and o right to his children, and they predeceas him. He then conceivably might be th heir or next of kin, and only to that tent could the settlor, under the Illi cases, in the *Spiegel* case, have gotten t property back.

These things that I have been discuss may be subtle casuistries, and the cases m involve "gossamer distinctions," but I s mit to you that there is nothing gossa about the $1,140,606.30 which is to added to Mr. Spiegel's estate if the S preme Court doesn't see fit to reverse Seventh Circuit. And though I cont that the executor and the beneficiaries this estate may be fully justified in garding as quite "unwitty" the assessm of some $451,000.00 in additional tax it seems to me that this case and the pr erty issues which it involves, demonstr that property law still does have some consequences.

34. 159 F. 2d at 258.
35. Id. at 258-259.
36. Id. at 259.
37. Ibid.

EDITORS' NOTE: The foregoing text of a lecture delivered at a lunch meeting of the Chicago Bar Associ held on September 29, 1947 under the a pices of the Committee on Trust Law

AMENDING THE REVENUE ARTICLE OF THE ILLINOIS CONSTITUTION

By Walter J. Cummings, Jr.

One of the most criticized provisions of the Illinois Constitution is Article IX dealing with Revenue. Sections 1 and 2 of this Article specify the kinds of taxes which may be levied. They provide as follows:

> Sec. 1. The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time direct by general law, uniform as to the class upon which it operates.
>
> Sec. 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this constitution.

These sections are presently construed to permit only three types of tax, namely, (1) property, (2) occupation, and (3) franchise and privilege.[1]

The general property tax, authorized by the first clause of Section 1, must be imposed on all property and in proportion to its value. To satisfy the latter requirement, the rate may not be graduated.[2]

The occupation and franchise and privilege taxes authorized by the second clause of Section 1 and by Section 2 need only be uniform as to the class upon which they operate. Uniformity as to these taxes means only that the classification be reasonable.[3] Graduated rates are not proscribed.[4]

County taxes are governed by the principles of Sections 1 and 2, for county taxes may only be levied under legislative authorization.[5] The same uniformity rules are likewise applicable to taxes of the more local governments.[6]

Illinois is supposedly one of the five remaining states whose constitutions require that when a property tax is imposed, *all* property must be assessed and taxed at the same rate.[7] In other words, in such jurisdictions, classification of property under a property tax is not constitutionally permissible.

Until recently, often repeated dicta of the Illinois Supreme Court in interpreting the Revenue Article made it appear that whenever a property tax was levied, prop-

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1 *People* v. *Barrett*, 373 Ill. 393 (1940); *Riet* v. *Barrett*, 355 Ill. 104 (1934); *Bachrach* v. *Nelson*, 349 Ill. 579 (1932).

2 *Bachrach* v. *Nelson*, 349 Ill. 579 (1932) invalidated a graduated income tax because it was "a tax on *property* by graduation other than by valuation."

3 See "The Illinois Constitutional Requirement of Uniformity in Taxation," 33 Ill. L. Rev. 57, 79-87 (1938).

4 The graduated State Inheritance Tax was upheld in *Kochersperger* v. *Drake*, 167 Ill. 122 (1897). The tax was sustained on the grounds that it was a privilege tax (upon the "right" to succeed to property) and the rule of uniformity as to class was not violated because the classifications prescribed were reasonable.

5 *Kocsis* v. *Chicago Park District*, 362 Ill. 24, 41 (1935); *People* v. *Chicago & E. I. R. Co.*, 305 Ill. 434, 458 (1922).

6 Sections 9 and 10 of Article IX require that local taxes shall be "uniform in respect to persons and property." *Inter alia*, these Sections require that local property taxes be in proportion to the value of the property assessed. *Sherlock* v. *Village of Winnetka*, 68 Ill. 530, 535 (1873); *Anderson* v. *City of Park Ridge*, 396 Ill. 235, 244 (1947).

7 Sears, "Constitutional Revision and Party Circle Bills," 14 Univ. Chicago L. Rev. 200, 207, note 39 (1947).

etc. could not be classified.[8] However, a 1941 opinion of the Illinois Supreme Court contained a strong dictum that "The Constitution does not prohibit a classification of property and taxpayers."[9] Although three Justices dissented from that opinion, the dictum has been approved in several successive decisions.[10] If the dictum should become law, the Legislature could of course authorize different tax rates and different methods of assessment to be imposed on such varied classes of "property" as real property, tangible personal property, intangible personal property, net income, etc. Nevertheless, the *ad valorem* requirement of the first clause of Section 1 might still prevent a graduated property tax from being imposed on any classes.[11] Because of the provisions of Section 3 of Article IX prohibiting the exemption of any but specifically named property and because Section 1, by its terms, contemplates that all property be taxed, at least a nominal tax would have to be placed on all classes of property not included in Section 3 if a scheme of legislature classification were enacted without constitutional change.

General Property Tax on Real Estate

Since the statistics are more readily available, the following discussion will be directed to the general property tax on Cook County real estate. However, it is believed that the state-wide picture is much the same.

In 1943, for the first time in a great many years, the assessing officials of Cook County purported to commence assessing Cook County real property at its fair cash value, as contemplated by the Constitution and statutes. Previously real property in Cook County had been assessed at 37 per cent or less, while the Department of Revenue of Illinois (or its predecessors) and the various counties used widely varying assessment bases, causing discrimination and confusion.

The Department of Revenue of Illinois is legally charged with assessing railroads and capital stock of certain corporations, and county taxes are levied on such assessment. Under an interpretation of the State Constitution by the Supreme Court of Illinois, the Department also must equalize its assessments in accordance with a state-wide average assessment ratio.[12] As a result of the Cook County Assessor's action in adopting full value, the State-wide ratio employed by the Department was forced up from 33 per cent in 1942 to 54 per cent in 1943, so that the equalized State assessments for railroads and capital stock were greatly increased.[13] Accordingly, the railroads and also those companies which are subject to capital stock assessment by the Department of Revenue were subjected to a higher state assessment for county taxes than previously. Inasmuch as real property subject to Cook County assessment was assessed at fair cash value instead of at 54 per cent, there was discrimination against such locally assessed property as compared with Department assessed property. On the other hand, inasmuch as the assessment ratios in almost all other counties were substantially less than 54 per cent (e.g. 21 per cent in Lake County), there was discrimination in

8. *People v. Grand Trunk R. R.*, 357 Ill. 493, 498 (1934); *First National Bank of Urbana v. Holmes*, 246 Ill. 362, 369 (1910); *C. B. & Q. R. R. Co. v. Aurora*, 99 Ill. 205, 212 (1881); cf. *Primm v. City of Belleville*, 59 Ill. 142 (1871).

9. *People v. Southwestern Bell Telephone Co.*, 377 Ill. 303, 307 (1941).

10. *People v. Allyn*, 393 Ill. 154, 160 (1946); *Routt v. Barrett*, 396 Ill. 322, 341 (1947); see also *People v. Olympia Fields Country Club*, 374 Ill. 10 (1940); *Mobile & Ohio Railroad v. State Tax Commission*, 374 Ill. 75 (1940); *The Hub v. Hanberg*, 211 Ill. 43 (1904).

11. The *ad valorem* principle of *Bachrach v. Nelson*, 349 Ill. 579 (1932) was recently approved in *People v. Union Electric Power Co.* 392 Ill. 271, 284 (1946).

12. *Mobile & Ohio Railroad Company v. State Tax Commission*, 374 Ill. 75 (1940).

13. First and Second Annual Reports of the Department of Revenue, p. 48.

such counties against Department assessed property as compared with locally assessed property.

To end the discrimination caused by two varying assessment ratios of state and county, the Legislature passed legislation in 1945 empowering the Department of Revenue to determine the multiplication factor to be applied to the aggregate assessment fixed by the local assessment officers in order to produce a ratio of assessed to full fair cash value equivalent to 100 per cent. The counties are required to use this basis in extending their taxes. In turn, the Department uses full value in making its assessments. The legislative intent was that all property in Illinois be assessed at 100 per cent before the levy of taxes.[14]

As a result of administrative and legislative improvements, discrimination in Cook County assessments of real estate within each class has been greatly lessened. However, the discrimination between classes of real estate continues. Legislative classification, discussed *infra*, might relieve this situation and also serve to reduce real estate assessment litigation. Real estate pays proportionately much higher taxes than personal property, except tangible personal property of corporations, which is assessed at approximately the same ratio of full value as real estate. For example, although Cook County realty is said to be worth only 40 per cent of the taxable property there and Cook County personalty 60 per cent,[15] in 1946 Cook County real estate was assessed at $7,167,581,889 and paid taxes of $175,154,808.96, whereas all personalty, tangible and intangible, was assessed at $1,895,188,97[16] and paid taxes of $41,911,319.01.[16]

One theoretical way to lessen the disproportionate tax burden on real estate would be to increase the burden on intangible personal property. As will be pointed out in the next section of this paper, it would seem to be impractical to derive further revenue from personalty without legislative classification. Under recent, repeated dicta of the Illinois Supreme Court,[17] it is possible that legislative classification can be achieved without constitutional amendment of the Revenue Article; otherwise, in an endeavor to distribute the property tax burden more equitably, the Revenue Article should be amended to permit classification.

General Property Tax on Intangible Personalty[18]

For years there have been no attempts in Illinois to assess intangibles at full value. Instead, the assessing officials have adopted the philosophy of the United States Supreme Court, which stated that "a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaption of property to its burdens." *Pacific Express Company v. Seibert*, 142 U. S. 339,351 (1892).

Because intangibles are easily concealed and because full value assessment on intangibles would result in confiscatory taxation and drive such property out of the

14. For a complete description of this ameliorative legislation, see *Anderson v. City of Park Ridge*, 396 Ill 235 (1947); Brasee, "State Taxation," 36 Ill. Bar J 11.

15. See "Taxation of Intangibles in Illinois," 35 Ill. L. Rev. 716, 724, note 52 (1941). As shown there, intangibles are still not assessed at 40 per cent, even after the Department of Revenue applies its equalization multiplier.

16. These assessed values reflect the multiplier applied by the Department of Revenue to the county assessments in order to obtain full value assessment.

17. See notes 9 and 10, *supra*.

18. The following discussion is oriented primarily to the situation in Cook County, but the situation there is quite typical of that elsewhere in Illinois.

state,[19] the Cook County Assessor has administratively classified intangibles at much lower percentages of value than other taxable property, so that intangibles are taxed at a much lower effective rate. For example, cash and bank deposits are only assessed at 4 per cent and stocks and bonds at 10 per cent of face or market value, or at two times the annual earnings, whichever is lower, no intangible being presumed to earn less than 2 per cent.

As a result of assessing intangibles at lower rates, commencing in 1931, more returns were filed so that the assessed valuation of intangibles jumped ten times in that year. The assessed value doubled again in 1937 when the Federal income tax returns became available to the Assessor.[20]

Through administrative classification, more intangibles have been reached. However, under the present system of administrative classification, Cook County intangibles were assessed at only $19,085,648 in 1946 (before applying the 1.59 equalization multiplier for 1946 of the Illinois Department of Revenue).[21] Since intangibles are reported at the rate of 10 per cent of face value on the average, the intangibles reported represented $190,856,480, which is one of the highest amounts ever reported but still absurdly low as compared with the real worth of Cook County intangibles.[22] The property tax receipts from intangibles in Cook County in 1946 were only $667,616.96, as compared with $445,911,319 from all personalty (including intangibles) and $175,154,808.96 from realty. These figures conclusively demonstrate the unworkability of the present system for taxing intangibles. As one authority has said, the present taxing of intangibles in Illinois "becomes a tax on honesty and offers a bonus for successful dishonesty * * * all the lawbreakers under prohibition would scarcely make a frog-pool in Lake Michigan compared to the number of lawbreakers developed under the present personal property taxes in Illinois."[23]

Not only has the administrative classification of intangibles failed to produce substantial tax receipts, but it also violates authoritative judicial statements that the Illinois Constitution forbids classification.[24] Taxpayers can hardly be expected to comply with administrative measures of doubtful legality. Surely an administrative classification which disregards statute and Constitution is ethically indefensible. Moreover, although the administrative assessment rules for intangibles may now be fair, the danger inherent in administrative classification is that these rules may be unjustly changed at will. If the general

19. See "The Constitution of Illinois" (Legislative Reference Bureau, 1934) pp. 36-37; Altman, "Taxation of Intangibles in Chicago," 33 Ill. L. Rev. 623, 624 (1939).

20. See *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 45. The County Assessor no longer checks with the Federal income tax returns since extra copies are not currently available in Chicago.

21. This 1.59 multiplier makes no attempt to bring the locally assessed value of intangibles up to 100 per cent. Instead, this multiplier is based on real estate valuation (primarily from sales records) in Cook County, as compared with the local assessor's valuation of real estate.

A taxpayer might successfully challenge the automatic application to his personal property of a multiplier based solely on real estate statistics. If, for example, an automobile has already been returned at its fair value, the application of a "real estate" multiplier thereto by the Department of Revenue would seem manifestly arbitrary and unreasonable.

22. In 1942, the full assessed value of moneys alone in Illinois was but a quarter of one per cent of the six billion dollars in individual bank deposits in the State. "A Constitutional Convention for Illinois" (pamphlet issued by League of Women Voters of Illinois), p. 5. See also note 15, *supra*.

23. Simpson, *Tax Racket and Tax Reform in Chicago*, (1939) p. 227. The present personal property tax system was also condemned by some of those attending the December, 1945 Chicago conference of the Illinois States Attorneys Association.

24. See note 8, *supra*. The assessing officials believe that under the Constitution and statutes full value assessments are required. See Clark, "Crazy Quilt Tax Assessment Hodge Podge in the State of Illinois" (1945) pp. 4-5; Illinois Assessor's Manual (1944) pp. 51-150.

property tax is not to be abandoned,[25] what is the solution?

It is submitted that a system of legislative classification of property should be tried even though constitutional amendment might be required.[26] Besides permitting legislative classification of property, the amendment could be phrased to authorize the exemption of a certain amount of ordinary personal belongings and furniture. In view of Sections 1 and 3 of Article IX, the present administrative exemption in Cook County of furniture to the extent of $400 seems clearly unconstitutional. In order to forestall future litigation, the amendment should make it plain whether or not graduated rates are to be permitted. All tangible personalty should not be exempted since such property furnishes a substantial, fair source of revenue, and besides it is often difficult to distinguish legally between real and personal property.

An amendment permitting legislative classification of property would enable the Legislature to experiment with various types of property classification to determine whether the general property tax could be made fairer and more workable. Legislative classification would prevent local assessing officials from making unreasonable administrative classifications. It would, also, preclude delinquent taxpayers from relying on the alleged illegality of administrative classification. Enforcement campaigns would then be buttressed by law and could, therefore, be waged more successfully. Legislative classification might reduce the congestion of the courts which review personal property assessments. Finally, the assessed value of intangibles and attendant revenue yield would be greatly increased according to the results achieved in states permitting a classified property tax,[27] so that the present untoward burden on real estate could be lessened.

The following criticism by Professor Kenneth C. Sears applies particularly to the existing method of taxing personal property:

> Article IX causes unnecessary perjury, discrimination, and much social confusion and frustration. Furthermore, the main reason that we manage to tolerate this Article is that officials do not faithfully comply with its requirements. The Article is a blight on progress and an unfortunate reflection of our lack of first rate political intelligence.[28]

Conscious of the need for reform, in 1916 the voters of Illinois voiced approval of a proposed amendment which would have permitted classification of personal property, by a vote of 656,298 to 295,792.[29] The amendment failed only because it lacked the affirmative majority *of all votes cast at the election*, as required by the archaic amending clause of the Constitution. If an amendment of this type, explicitly stating that income taxes were not thereby being authorized, were submitted to the voters after an educational and promotional drive, it should have a real chance of adoption. Unless the Supreme Court of Illinois should in the meantime sustain legislative classification, every effort should be made to secure an amendment permitting it. Such an amendment should be welcomed by the citizens of Illinois, as a definite means of combatting the widespread practice of filing perjured returns which makes a mockery of our revenue system.

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25 For criticism of the general property tax see Manchester, *Taxation in Illinois* (1922) pp. 23-31; Simpson, *Tax Racket and Tax Relief in Chicago* (1939), pp. 225-236, 239-250, 51.

26 As already pointed out in recent opinions the Supreme Court of Illinois has said that the Illinois Constitution does not prevent classification (see notes 9 and 10, *supra*). Accordingly, a constitutional amendment may be unnecessary.

27 "The Constitution of Illinois" (Legislative Reference Bureau, 1934), p. 39.

28 Sears, "Constitutional Revision and Party Circle Bills," 14 Univ. Chicago L. Rev. 200, 207 (1947).

29 Sears, "Constitutional Revision in Illinois," 33 Ill. L. Rev. 2, 7 (1938).

Some Possible Amendments to the Revenue Article

As shown above, assuming the Supreme Court will not in the future permit legislative classification of property, Article IX of the Constitution should be amended in that respect. The following amendments of Article IX should also be considered:

1. Instead of spelling out exemptions as in Section 3, that matter might well be relegated to the Legislature. At least, besides the existing constitutional exemptions, the exemption of household property and ordinary personal belongings up to a certain value should be permitted, if only to legalize the existing unconstitutional administrative practice. The amendment could authorize other exemptions in case an income tax or a privilege or occupation tax measured by net income eventually is authorized.

2. Section 12 prohibits local governments from becoming indebted to an amount exceeding 5 per cent of the last assessed value of the taxable property therein. This provision has been evaded by the creation of 429 unwieldy and costly municipalities in Cook County alone and more than 15,000 taxing bodies in the State, which is one-tenth of all the taxing bodies in the United States. By amendment, the Legislature might be empowered to fix the debt limitation, or the people of the local government by a majority of votes cast upon the question. It has been suggested that the rate be increased to 7 per cent of the assessed value of tangible property,[30] but that suggestion was made in 1939, prior to the tremendous increase in assessed values resulting from the assessment of property at 100 per cent instead of a fraction thereof. At present, virtually every taxing body has a large unused margin of bonding power.

3. Under interpretations of Section 12, local governments can only pay bond issues out of property taxes. Section 12 might be amended to permit the payment of debt interest and principal out of other sources of revenue as well.

4. Shorten the two-year right of real estate redemption from sales for the non-payment of taxes, as contained in Section 5, so that tax purchasers will be assured of "title" earlier. Thus it might be possible to secure somewhat fairer prices at tax sales. The two-year period also applies to foreclosure sales of property forfeited to the State through lack of purchasers at the original annual tax sale by the county collector. Different periods might be provided for the two types of sale. In order to clarify any doubts, the two periods should be stated to be non-cumulative. Probably the amendment should leave to the Legislature the whole subject of tax sales now covered in Sections 4 and 5.

5. Remove the restrictions as to notice found in Section 5 so that tax deeds may issue on terms fixed by the Legislature.

6. Authority for the State to commute local taxes by substituting therefor a state tax is favored by some tax experts. This would cover *Raymond* v. *Hartford Fire Insurance Co.*, 196 Ill. 329 (1902), which invalidated a statute imposing a tax on foreign life insurance companies measured by a percentage of gross Illinois premiums as violating Sections 9 and 10, because the statute attempted to exempt the companies from city taxes on personal property.

7. Some persons favor permitting local governments to be allowed to adopt such system of assessing and levying taxes as the voters thereof might approve by a certain percentage of votes cast upon the question. At present, local governments must comply with the *ad valorem*, uniformity and exemption restrictions of Sections 1, 3, 9 and 10 of Article IX. If an amendment of this type is ever drafted, appropriate safeguards should be included.

Income Tax

The general property tax provision of our 1818 Constitution was retained the

30. *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 342

1870 Constitution as a means of taxation according to ability to pay, for at that time the wealth of the State still consisted chiefly of realty and tangible personal property. Now intangibles comprise a tremendous source of wealth. Wages and salaries are believed to account for 60 per cent of the present net income of the population of Illinois, and interest and dividends for 16 per cent thereof.[31] As shown, it has thus far proved impossible to apportion to intangibles and other personalty their fair share of general property taxes. Judge Cooley has epitomized the difficulty of taxing personalty as follows:

> Taxation of personal property has never been a success. It is subject to the following very important objections:
>
> (1) It cannot be assessed without inquisitorial process of some kind, instituted for the purpose of ascertaining that which is not open to public inspection and which the individual, except under the compulsion of such process, would not consent to disclose.
>
> . . . . .
>
> (2) The assessment of personalty holds out constant and very powerful temptations to defraud the state by concealing the knowledge of everything which the taxpayer believes cannot easily be discovered. This is so well understood that it is scarcely expected that citizens will voluntarily state what they possess or that officers will make much if any effort to discover. Indeed, the assessment of personal property reaches so small a proportion of the amount really protected by government, that it might almost be said that laws for the purpose remain on the statute books rather as incentive to evasion and fraud in the dealings of the citizens with the state than as a means of realizing a revenue for public purposes.[32]

Nevertheless, local taxation still depends to a large extent on personalty taxation and will apparently have to do so unless some form of income levy is substituted.

In 1932, the Illinois Supreme Court invalidated a State net income tax on the ground that it was a property tax whose graduation feature was held to conflict with the *ad valorem* principle of the first clause of Section 1 of the Revenue Article.[33] However, classification, including graduated rates, is constitutionally permissible for occupation and franchise and privilege taxes.[34] Hence, it would seem that the State might validly exact a graduated tax, measured by net income, on individuals and corporations for the privilege of creating and receiving income. Perhaps, instead, the State might adopt a program of graduated occupational taxation based upon net income without violating the uniformity requirements of Section 1. Precedent for such taxation may be found in the decision validating a graduated inheritance tax levied upon the privilege of inheriting property[35] and on decisions upholding the net receipts tax levied upon foreign fire insurance corporations for the "doing of business" in Illinois.[36] Until passed upon by our Supreme Court, of course, no one can foretell with certainty whether a graduated privilege or occupation tax measured by net income is constitutional. If such taxation were sustained, no exemptions (except those specified in Section 3) could be contained therein because Sections 1 and 3 of Article IX would require the imposition of at least nominal rates on low-bracketed income.

Many serious students of tax reform in Illinois believe that a graduated income tax would be more equitable than either the general property tax or the Retailers' Occupational Tax because the former has thus far overburdened real estate through the escape from taxation of intangible personal property, and the latter tax ignores ability to pay. Unless more intangibles can be reached through legislative classification of property, these persons believe that the

31. *Illinois Tax Problems* (Illinois Tax Commission, 1940), p. 138.

32. Cooley, *The Law of Taxation* (4th ed., 1924) sec. 39.

33. See note 2, *supra*.

34. See notes 3 and 4, *supra*. But in *The People v. Union Electric Power Co.*, 392 Ill. 271, 286 (1946), the Court said the principle that "the ratio must be uniform" applies to the second clause of Section 1 as well as to the first clause.

35. See note 4, *supra*.

36. *People v. Kent*, 300 Ill. 324 (1921); *People v. Barrett*, 309 Ill. 53 (1923).

taxing authorities should be free to substitute a graduated income tax for a property tax on intangibles, which are largely escaping taxation.

Some critics of the Illinois tax system favor a constitutional amendment to permit the levying of a graduated net income tax, in order to reach those who are at present escaping their fair share of state and local taxation. If such an amendment is ever offered to the voters, it should specify that if a state income tax were enacted, the receipts therefrom should be divided between state and localities in certain proportions, so that the farming population would not be unduly favored by benefits paid for by tax receipts from urban areas. The subject of exemptions should be covered. There might also be a provision in the amendment empowering municipal bodies, if authorized by the Legislature, to levy a graduated net income tax regardless of the uniformity provisions of Sections 9 and 10. To make the amendment more palatable politically, a clause could be included which would limit the permissible graduations.

Because of the opposition of influential groups, proponents of an amendment of Article IX which would permit a conservatively graduated income tax should realize that such an amendment will only receive popular approval if the voters are schooled to realize, *inter alia*, the following salient points:

1. Existing law requires that personal property be assessed at full value. Enforcement of this requirement would result automatically in the confiscatory taxation of personal property. This is a dangerous weapon for an assessor to possess and could be buried by the substitution of a reasonable income tax.

2. Under the present Constitution, the Legislature is seemingly empowered to levy burdensome privilege or occupational taxation measured by net income. Hence, an amendment to permit the levy of a really fair type of income tax, with appropriate exemptions, would actually be a safeguard.

3. The present system of taxation results in public perjury.

4. Because of constitutional limitations the tax burden is now distributed inequitably in Illinois.

Attempts to Revise the Revenue Article

Twice the people of Illinois have had opportunities to express themselves on the Revenue Article of the 1870 Constitution through the state-wide referendum device authorized by the still extant Public Policy Act of 1901 (Laws 1901, p. 198, secs. 1, 2; Smith-Hurd Ill. Ann. Stats., Ch. 46, secs. 28-1, 28-2, 28-3). In the 1904 referendum, a large majority voted that the Legislature should submit an amendment enabling local governments to adopt such system of assessing and levying taxes as the voters thereof might desire. Again, a large majority in 1912 voted that an amendment should be submitted providing for the classification of property with taxes uniform as to each class.

Four amendments of the Revenue Article have been submitted to the voters. The 1916 amendment would have permitted the classification of personal property and the exemption from taxation by general law. There were 656,298 votes for this amendment and 295,782 against it.

The 1926 amendment would have permitted the taxation of persons, property and income free from the limitations of Sections 1, 3, 9, and 10 of Article IX. Real property would not have been classifiable except that mineral and reforestation lands might be in different classes. Again, exemptions would be permissible by general law. A two-thirds vote by each House was to be required to put into effect any of the innovations envisaged by the amendment. There were 651,768 votes for this amendment and 476,455 against it.

The 1930 amendment was similar to the 1926 one as to real estate [illegible] the

general assembly was otherwise to have untrammeled power to enact revenue laws. There was a special provision, Section 3, providing for the allocation of income tax revenues among the State, counties and municipal corporations. The provisions of Section 9 were to be broadened to include "sanitary districts, park districts and other municipalities," and the uniformity clause was removed as to taxes assessed and collected by municipalities. Section 10 was to be liberalized so that the State could impose income taxes upon inhabitants of municipal corporations for corporate purposes, provided that the proceeds were allocated under the revised Section 2 mentioned above. The uniformity clause was excised from Section 10. Only 371,812 voted for this amendment and 513,861 were against it.

The 1942 amendment would have permitted the General Assembly to exempt sales of food from the Retailers' Occupational Tax. At the election, 979,892 voted for this measure and 346,232 against it.

The Constitution of 1922 was badly defeated at the polls when 921,398 voted against it and only 185,298 were in its favor. *Inter alia*, it would have permitted an ungraduated income tax on income from intangibles in lieu of a property tax on intangibles. It would have also permitted a graduated net income tax, but with the highest rate no more than three times the lowest. A number of specific exemptions were provided. Forested property was to be classified or exempted. There was a special provision permitting a tax buyer to waive his title and to proceed through foreclosure to have the property sold by a court and the proceeds of the sale, distributed to him and the owners of the property.[37]

[37] The revenue provisions of the proposed 1922 Constitution have been severely criticized. See Davis, "Defects and Causes of Defeat of the Proposed Constitution of 1922," 26 Chicago Bar Record 276, 278, 280 (1945). The language used in each attempt to revise the Revenue Article appears in the Chicago Daily Law Bulletin of February 10, 1938, p. 2 *et seq.* and in I Laws of Illinois, 62nd General Assembly (1941), p. 1326.

On the foregoing seven occasions between 1904 and 1942, a majority of those voting at the election never expressed themselves in favor of amendment of the Revenue Article, although a majority voting *on this subject* favored amendment five out of the seven times. These statistics show that without a general public drive, it would be extremely difficult to secure an overall revision of the Revenue Article under the present amending clause of our Constitution requiring approval by a majority of all those voting at a general election (rather than by a majority voting on the particular proposal). Since some of the proposed amendments were more popular than others, it would seem prudent to draft amendments to the Revenue Article which could be submitted seriatim to the voters, so that at any rate some desirable improvements could become effective. According to past experience, if revisions of the Revenue Article were submitted as one proposal at the polls, the proposal would seem doomed to failure, at least unless a Gateway Amendment or an otherwise revised system of voting on the adoption of amendments were by then operative.

Conclusion

Illinois is one of the five remaining states whose constitutions have not been held to permit the classification of property for purposes of property taxation. Consequently, assessing officials in Illinois have been forced to classify property administratively. Administrative classification contravenes authoritative judicial statements interpreting the Revenue Article of the Constitution. Despite administrative classification a great deal of intangible personal property is escaping taxation. Legislative classification should be attempted to increase the tax revenues from intangible personal property and to decrease perjured returns. In the light of dicta in recent decisions of the Supreme Court of Illinois, legislative classification might survive attack in the courts without constitutional amendment, but otherwise the Constitution should

be amended to permit it. In order to insure its adoption, such an amendment should state that income taxes were not thereby being authorized.

Many tax experts believe that the Legislature and local taxing officials should be empowered by constitutional amendment to levy a graduated net income tax if attempts to levy graduated occupational or privilege taxes measured by net income are invalidated. If decided upon, an amendment authorizing a graduated net income tax should be submitted to the voters separately from an amendment authorizing legislative classification of property in order not to jeopardize the passage of the classification amendment. Any other amendments of the Revenue Article should also be submitted separately at the polls so that the less popular amendments will not prevent other amendments from being adopted.

As it has been judicially interpreted, Article IX of the Constitution does not give the Legislature leeway to determine the fairest type of taxation. Certainly under a democratic form of government, the Legislature should not be hamstrung from enacting taxes it considers desirable. To reserve to the public a proper measure of protection, the legislative powers of taxation should not be completely unrestricted, and in fact, no constitutional amendment removing all restrictions would have the slightest chance of adoption.

To secure an expert and unbiased scheme, it would seem preferable to revise the Revenue Article through the medium of a constitutional convention rather than through legislatively drafted amendments. Revisions secured through a constitutional convention would also have a better chance of success at the polls[39] since they could be submitted at a special election at which the ballots would contain no other distracting matter. At the election, the public should be given the opportunity to approve only those revisions it favors. Most of the opposition to constitutional revision comes from opponents of an income tax. An constitutional convention will be acutely aware of this opposition and might well decide not to jeopardize the chances of approval of needed reforms in the Revenue and other Articles by authorizing the imposition of a graduated net income tax. Those who fear an income tax would have a chance at the convention to sponsor an amendment of Section 2 of the Revenue Article which already seemingly empowers the Legislature to authorize privilege and occupational taxes measured by net income. As shown, entirely disregarding the income tax problem, the Revenue Article should be revised in several respects. Revision of our State constitution is so vital to progressive government in Illinois that this program must not be delayed by any personal predilections as to income taxes.

38. See Wittwer, "Illinois Constitution and the Courts," 15 Univ. Chicago L. Rev., 53, 70 (1947); *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 335.

39. In order to secure adoption of a legislatively drafted amendment without a Gateway Amendment, it would seem necessary to change the present method of voting by "party circle" or similar device. See *Illinois Tax Problems* (Illinois Tax Commission, 1940) p. 354.

CANONS OF PROFESSIONAL ETHICS

7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer are unworthy of those who should be brethren at the Bar; but nevertheless it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or negligent counsel, generally after communication with the lawyer of whom the complaint is made.

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MEMORIALS

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Roy Massena

Roy Massena, a member of the Chicago Bar Association since 1919, passed away in St. Luke's Hospital on Friday, September 26, 1947. He was born in Marshall County, Indiana, August 30, 1881, the son of Adam H. and Elizabeth Massena. He was graduated from Wabash College with an A.B. degree in 1902; and from the University of Chicago with the J.D. degree cum laude, in 1917. He was a member of Delta Tau Delta, Phi Delta Phi and Phi Beta Kappa fraternities.

Following his admission to the Illinois Bar in 1917 he became city attorney for Blue Island, Illinois, in which capacity he served until 1935. He was attorney for the Board of Review of Cook County, Illinois from 1918 to 1932 and a Master in Chancery of the Circuit Court of Cook County from 1936 to 1946. In January 1926 he became a member of the law firm of Deneen, Healy & Lee, which became Deneen & Massena about May 1, 1936. He continued his association as a law partner of the late Senator Charles S. Deneen until the senator's death in 1940, after which he continued to practice under the old firm name with other partners and associates.

From the time Mr. Massena became a member of the Chicago Bar Association he took an active part in the work of the association and continued to give freely of his time, energy and unusual abilities until his death. At various times he served as a member of the Board of Managers and on the following committees: Municipal Court, Rules of Court, Military Service, War Activities, Grievance and Association Meetings. He also was a member of the American Bar Association, the Illinois State Bar Association, Chicago Law Institute, Art Institute of Chicago, Chicago Natural History Museum, Baptist Church and Masonic Lodge. His club memberships included Lake Shore, Midlothian Country and Tippecanoe Lake Country.

In 1907 he was married to Mabel Hood at Warsaw, Indiana. His residence was in Blue Island, Illinois. In addition to his widow he is survived by one son, Frederick, at present attending Wabash College, and one sister, Mrs. C. A. Rovenstine of Elkhart, Indiana.

Mr. Massena was an extensive reader of good literature and he was very much interested in encouraging young men to acquire an education. He also took an active part in civil affairs and religious and other charities. He was a brilliant student and a lawyer of exceptional ability. He liked people and enjoyed practicing law. A spirit of friendliness always existed when he was in the office or court room. One of his friends upon hearing of his death said "A bit of sunshine has gone out of our lives." The Chicago Bar Association and the legal profession has lost an able and worthy member.

CANONS OF JUDICIAL ETHICS

17. Ex parte Communications.

He should not permit private interviews, arguments or communications designed to influence his judicial action where interests to be affected thereby are not represented before him, in cases where provision is made by law for ex parte application.

While the conditions under which briefs of argument are to be received are matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to a judge intended or calculated to influence action should be made known to opposing

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